UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NATALIA USECHE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 8:20-cv-2225-PX-PAH-ELH

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

The Constitution, Statutes, and Rules

Executive and Administrative Materials

Legislative Materials

Court Filings

Other Authorities

INTRODUCTION

In response to Plaintiffs' Motion for Summary Judgment or a Preliminary Injunction on certain claims set forth in their First Amended Complaint, Defendants have filed a near-carbon copy of the brief they filed in a parallel action in the Southern District of New York, *New York v. Trump*, No. 1:20-cv-5770 (S.D.N.Y.).[1] *See* Defs.' Opp., ECF No. 36 ("Opp."). On September 10, 2020, the three-judge panel in *New York* rejected most of Defendants' positions and granted the *New York* plaintiffs' motion for partial summary judgment, declaring the Presidential Memorandum (the "Memorandum") unlawful and enjoining all Defendants (other than the President) from complying with the Memorandum. *See New York v. Trump*, 2020 WL 5422959, at *36 (S.D.N.Y. Sept. 10, 2020). This Court should reach the same conclusion, but should do so on a broader and more comprehensive basis than the *New York* court's decision.

First, in addition to the actual harms from the Memorandum's impact in deterring 2020 Census participation and diverting the Organizational Plaintiffs' resources, Plaintiffs have demonstrated a substantial risk of a concrete apportionment injury. Defendants have proffered no evidence whatsoever that, absent Plaintiffs' requested relief, the President will curtail or be unable to implement the unlawful policy that the Memorandum announces. To the contrary, the Memorandum does not ask or permit the Secretary to make a determination as to whether that policy is "feasible": it orders Defendants to identify as many undocumented immigrants as they can so that the President can then unilaterally—and unlawfully—excise them from the apportionment base. There is no reason to believe that Defendants will somehow fail to come up

[1] This includes sections addressing claims not at issue on Plaintiffs' motion here. In *New York*, Defendants moved to dismiss, challenging, *inter alia*, the sufficiency of the New York plaintiffs' claim under the Administrative Procedure Act (APA). *See* Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss 19-21, *New York v. Trump*, No. 1:20-cv-5770 (S.D.N.Y. Aug. 19, 2020), ECF No. 118. They have not filed such a motion in this case. Accordingly, this Court need not address Defendants' arguments with respect to the APA or any other claim not raised by Plaintiffs' motion.

with numbers sufficient to satisfy the Memorandum's stated goal: depriving States with large undocumented immigrant populations of congressional representation for allegedly "hobbl[ing] Federal efforts to enforce the immigration laws." Memorandum § 2. The sword of Damocles that the Memorandum raises over such States' heads threatens real, cognizable harm to Plaintiffs' representational interests.

Second, while the Memorandum plainly violates 13 U.S.C. § 141 and 2 U.S.C. § 2a and therefore must be stricken as *ultra vires*, these statutory violations are intimately related to the Memorandum's violation of constitutional commands under the Apportionment and Enumeration Clauses. The statutory commands of these provisions mirror and reinforce the constitutional mandate: all inhabitants of the United States must be counted without regard to immigration status per se, and the apportionment of representatives must be based exclusively on the "Enumeration" directed by Congress—not some other set of figures jiggered outside the census at the eleventh hour. There is no daylight between the statutory provisions and the constitutional requirements they implement, and this Court should exercise its discretion to strike the Memorandum on both statutory and constitutional grounds.

As demonstrated below, Defendants' arguments in defense of the Memorandum are fundamentally flawed. Unable to dispute the overwhelming evidence of the Framers'—and subsequent Congresses'—understanding and intent, Defendants instead attempt to drastically overstate Plaintiffs' burden. But Plaintiffs do not have to prove that no conceivable subset of undocumented immigrants could ever be excluded from the census count. Rather, Plaintiffs' burden is met by demonstrating that the Constitution and the statutory framework prohibit exclusion of undocumented immigrants categorically on the basis of immigration status alone. That is the unlawful policy that the Memorandum blatantly announces and that Defendants are

currently proceeding to implement. The speculative alternative possibilities and flights of fancy that Defendants spin out in their opposition brief are mere red herrings and do not undercut Plaintiffs' motion.

No less unconvincing are Defendants' attempts to rationalize the Memorandum's determination to turn the Apportionment and Enumeration Clauses on their head—along with over two centuries of consistent interpretation and statutory implementation and practice. Whatever the boundaries of the terms "inhabitant" and "usual residence" may arguably be at the margins, no rational construction of these terms could exclude an entire category of persons "not in a lawful immigration status," Memorandum §§ 1-2, even when millions of them have undisputedly maintained their domicile and physical presence in the United States for decades. Nor can the Supreme Court's language in *Franklin v. Massachusetts*, 505 U.S. 788, 799-801 (1992), support Defendants' assertion that the President's "discretion" after receiving the Secretary's tabulation of total population extends so far as to materially alter the results of the decennial census based on discrete sets of figures that even Defendants have admitted are *not* part of the Census.

In short, Defendants fail to present any argument of fact or law sufficient to avoid judgment against them on Plaintiffs' statutory and constitutional claims. As shown in Plaintiffs' opening memorandum, ECF No. 19-1 ("Pls.' Mem.") and explained more fully below, Plaintiffs' motion should be granted.

ARGUMENT

I. This Case Is Justiciable.

Defendants assert that this case is not justiciable on either standing or ripeness grounds. Opp. 6-18. Defendants' arguments vary, however, based on the nature of the injuries that Plaintiffs have asserted. Plaintiffs have submitted evidence supporting three types of injuries that they are suffering or are substantially likely to suffer: (1) a vote-dilution harm based on the states where

several of the Individual Plaintiffs reside being apportioned fewer congressional seats pursuant to the policy announced in the Memorandum; (2) enumeration harms resulting from the Memorandum's deterrent effect on Census participation that is particularly pronounced in Plaintiffs' communities; and (3) harm to the Organizational Plaintiffs by impairing their organizational activities and making the conduct of those activities more costly.

As to the vote-dilution harm resulting from the effect of the Memorandum on apportionment, Defendants contend that Plaintiffs have failed to meet the standing requirement of an "injury-in-fact," Opp. 10-11, and relatedly, that Plaintiffs' claims are not ripe, Opp. 6-9. But Plaintiffs need only show that there is a substantial risk that these apportionment harms will occur, which they have more than done, to establish that they have Plaintiffs' constitutional standing to bring this suit. For the same reason, Plaintiffs' claims are plainly ripe for adjudication. They are not required to wait for the harms to fully materialize before obtaining judicial relief.

As to the other two harms, Defendants do not contest ripeness, *see* Opp. 6-9, but argue that Plaintiffs have failed to establish any of the three elements of standing—injury-in-fact, traceability, and redressability, Opp. 11-18. These arguments likewise fail, as the unrebutted evidence shows that the Memorandum is likely depressing Census response rates and generating an incremental undercount in Plaintiffs' communities.

A. Plaintiffs Have Standing to Bring This Action.

The "presence of one party with standing assures that [the] controversy before [the] Court is justiciable." *Dep't of Commerce v. U.S. House of Representatives* ("*Commerce v. House*"), 525 U.S. 316, 330 (1999). A plaintiff has standing when it "ha[s] (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs submitted evidence supporting

each of these elements as they were required to do, *see, e.g.*, *Commerce v. House*, 525 U.S. at 329, and Defendants' tangential evidentiary proffer in opposition cannot suffice to create any genuine issue of material fact as to Plaintiffs' standing. *Cf. United States v. Phillips*, 883 F.3d 399, 405 (4th Cir. 2018) ("[The court] construe[s] evidence in the light most favorable to the non-movant," but does "not similarly construe an absence of evidence."). When standing is established, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citation omitted). Defendants' contention that the Court should postpone review on ripeness grounds has no foundation where Plaintiffs' unrebutted evidence establishes all three components of standing.

1. Plaintiffs Have Established Injuries-in-Fact.

Any "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" qualifies as an injury-in-fact. *Defs. of Wildlife*, 504 U.S. at 560 (citation omitted). Future injuries suffice "if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)), but "a plaintiff need not prove that she is guaranteed to suffer a future injury in order to have standing," *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 516 (D. Md. 2010); *see also Bane v. Va. Dep't of Corr.*, 2012 WL 6738274, at *4 (W.D. Va. Dec. 28, 2012) (same). Assessed under these standards, Plaintiffs have established cognizable harm of each of the three types identified.

a) The Memorandum is Highly Likely to Inflict Vote-Dilution Harm on the Individual Plaintiffs by Changing the Apportionment of Congressional Seats.

The "*expected* loss of a Representative . . . undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Commerce v. House*, 525 U.S. at 331 (emphasis added). Here,

the Memorandum plainly creates a "substantial risk" that one or more states in which at least one individual Plaintiff resides will lose a congressional seat. This risk is not based on a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, but rather flows inexorably from two undisputed facts: (1) the Memorandum directs the Commerce Department to generate population figures that can be used to implement the declared policy of excluding undocumented immigrants from the apportionment base for the expressly stated purpose of penalizing certain states with large undocumented immigrant populations, and (2) it is virtually certain that the exclusion of undocumented immigrants will deprive California and Texas of congressional seats.

Indeed, the policy announced in the Memorandum is expressly *intended* to reduce representation in states with large numbers of undocumented immigrants—even singling out California as such a state. Memorandum § 2 ("Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated."). The loss of a congressional seat is therefore not speculative: it depends only on the substantial likelihood that Defendants will do exactly what they announce: exercise their purported "authority to exclude from the apportionment base aliens who are not in a lawful immigration status." Memorandum § 1.

Defendants contend that the Memorandum's direction to the Secretary to supply exclusion data "to the extent feasible" somehow introduces so much uncertainty about whether the President will implement the Memorandum's stated policy as to negate even a "substantial likelihood" of harm. But this phrase is a mere fig leaf attempting to shield a nakedly unlawful policy from judicial scrutiny. The Memorandum does not ask the Secretary for a feasibility determination: to the

contrary, it orders the Secretary to supply as much data on undocumented immigrants as is "feasible" in the time remaining, "consistent with" the President's allegedly limitless "discretion" to alter the decennial census figures in the Secretary's report under 13 U.S.C. § 141. Defendants' attempt to transform "to the extent feasible" into a convenient savings clause is an "intellectual cul-de-sac" that cannot be used to "preclud[e] resolution of the critical legal issues" and turn judicial review into "a meaningless exercise." *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) (rejecting reliance on a savings clause directing executive action "to the extent consistent with law"). Indeed, Defendants fail to identify any authority in which such a clause was sufficient to insulate executive action from judicial review.

The Memorandum's failure to provide any criteria or guidelines for evaluating "feasibility" underscore that the phrase is just empty boilerplate. Indeed, "to the extent feasible" is implicit in any executive direction of this kind: the Secretary cannot provide more information than it is feasible to provide. Neither Defendants' brief nor the accompanying declarations identify *any* circumstances under which it might not be "feasible" to satisfy the Memorandum's directive. To the contrary, Defendants' statements suggest that they believe they *can* feasibly exclude undocumented immigrants from the apportionment base. As the Memorandum states, the President previously instructed federal agencies to share administrative records with the Commerce Department that would allow it to obtain "accurate data on the number of . . . illegal aliens in the country." Memorandum § 1. The Commerce Department and Census Bureau have since confirmed that they are using administrative records to implement the Memorandum. Abowd Decl. ¶ 15. And Director Dillingham confirmed to Congress six weeks ago that "the Census Bureau has begun to examine and report on methodologies available" to implement the policy announced in the

Memorandum.[2] Though Defendants may not have settled on a precise methodology, there is no evidence suggesting that they will be unable to generate *any* statewide tabulations of undocumented immigrants. Where the remaining "uncertainties are how, not if, the policy will be implemented," Plaintiffs' standing is clear. *Stone v. Trump*, 280 F. Supp. 3d 747, 767 (D. Md. 2017). The Memorandum leaves no doubt as to what the President intends to do, and there is at least—indeed, far more than—a substantial likelihood that he will get the data he demands to implement it.

Even if there were some conceivable scenario in which Defendants might conclude that generating a useable tally of undocumented immigrants is not "feasible," that theoretical possibility falls far short of defeating Plaintiffs' showing of "substantial risk." Defendants' statements and conduct makes clear that they intend to carry out the Memorandum's announced policy. In the President's own words, the Memorandum unqualifiedly "direct[s] the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census."[3] Section 3 of the Memorandum "unambiguously commands action" to effectuate the exclusion of all undocumented immigrants; consequently, "there is more than a mere possibility that some agency might make a legally suspect decision." *San Francisco*, 897 F.3d at 1240 (citation omitted). Indeed, since the Memorandum's issuance, Defendants have confirmed that the Secretary of Commerce and Census Bureau are working to implement the Memorandum's commands. And Defendants have "not disavowed any intention" of continuing to do so—far from it. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979).

---

[2] Prepared Statement of Dr. Steven Dillingham Before the House Oversight and Reform Committee (July 29, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Testimony%20Dillingham.pdf.

[3] Statement From the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment.

The undisputed circumstances here include: (1) the Memorandum's conclusion that all undocumented immigrants may be excluded from the apportionment base and announcement of a policy mandating their exclusion, (2) the President's contemporaneous statements that the Memorandum unqualifiedly directs the Secretary of Commerce to carry out this exclusion, (3) the Census Bureau's confirmation that Defendants have been and are currently working to implement this policy, and (4) the absence of any disavowal by Defendants. On this record, "no speculation [is] necessary for the Court to find that Defendants will continue with their current course of conduct and [implement the Memorandum's policy] in the manner directed by the President." *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 908 (N.D. Cal. 2019), *aff'd*, 963 F.3d 874 (9th Cir. 2020).[4] The mere chance that "in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect" does not defeat justiciability. *Stone*, 280 F. Supp. 3d at 767; *see also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("the possibility that defendants may change their course of conduct is not the type of contingency" that renders a future harm speculative). Plaintiffs have amply established a substantial likelihood of apportionment injury traceable to the Memorandum, and their claims are therefore justiciable on that ground.

There is no real dispute that once implemented, the Memorandum's policy of excluding undocumented immigrants from the apportionment base is virtually certain to cause California and

[4] Injuries "contingent upon a decision to be made *by a third party*" may be insufficient to support justiciability as Defendants' cited authority explains, Opp. 8 (emphasis added) (quoting *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013)), but Defendants are the only relevant decisionmakers here. For this reason, Defendants' reliance on *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), and *Frank Krasner Enters. Ltd. v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005), also fails. In both cases, the Fourth Circuit held that the plaintiffs lacked standing because "*any* harm to the plaintiffs results from the actions of third parties not before this court." *Lane*, 703 F.3d at 674 (emphasis added); *see also Frank Krasner*, 401 F.3d at 235-36.

Texas to lose congressional seats. Dr. Gilgenbach's analysis establishes this likelihood with greater than 90 percent certainty. *See* Pls.' Mem. 26-27; Gilgenbach Decl. ¶¶ 33, 38-39. Notably, Dr. Gilgenbach's conclusions hold under an exceptionally broad range of assumptions and accounting for significant statistical uncertainty. *See* Gilgenbach Decl. ¶¶ 22-39, tbls. 5-9.

Defendants do not meaningfully challenge Dr. Gilgenbach's conclusions or the reliability and merits of the methodology that she applies. Nor could they, given that the "residual estimation method" that Dr. Gilgenbach uses is a widely-accepted methodology that the President's July 2019 Executive Order itself contemplates. *See* Gilgenbach Decl. ¶ 13. Tellingly, despite the work that Defendants have done since July 2019 to develop estimates of the undocumented population, they have not presented any contrary analysis of the potential range of undocumented immigrants who will be excluded under the Memorandum and the resulting effect on apportionment.

Instead, Defendants weakly complain that Dr. Gilgenbach relied on the "wholesale exclusion" of undocumented immigrants and did not address the apportionment impacts of "some hypothetical smaller exclusion." Opp. 44. This argument fails for at least two reasons. *First*, wholesale exclusion of undocumented immigrants is precisely the policy that the Memorandum announces and then directs the Secretary to implement "to the maximum extent feasible." Memorandum § 2. Defendants' critique thus rests on the purely theoretical possibility that they will simply fail to execute this stated policy—a circumstance that Defendants nowhere suggest is foreseeable, let alone likely. They offer no facts or evidence that could lead the Court to conclude that such a "hypothetical" scenario is anything but highly unlikely. Opp. 44. *Second*, Dr. Gilgenbach's conclusion as to the virtual certainty that California and Texas will lose congressional seats already allows for significant uncertainty in the number of undocumented immigrants that would be excluded from each state's population. *See* Gilgenbach Decl. ¶ 17.

b) The Memorandum Disproportionately Deters Census Participation in Plaintiffs' Areas, Inflicting Enumeration Injuries on Plaintiffs.

Plaintiffs' opening memorandum and supporting declarations demonstrate that (1) the Memorandum—and its unambiguous signal that undocumented immigrants simply do not count for apportionment purposes—deters participation in the 2020 Census *on an ongoing basis*; (2) that this deterrent effect is particularly pronounced in Latino and immigrant communities; and (3) that this additional marginal undercount translates directly to funding and further vote-dilution harms to the Individual Plaintiffs. Pls.' Mem. 28-31; *see* Barreto Decl. Defendants do not dispute (nor could they) that a further undercount would translate into funding and vote-dilution harms. *See, e.g.*, *Dep't of Commerce v. New York* ("*New York II*"), 139 S. Ct. 2551, 2565 (2019); *Commerce v. House*, 525 U.S. at 332-34. As to the first two propositions, Defendants' evidence is insufficient to create a genuine issue of material fact as to the Memorandum's deterrent effect.

Defendants repeatedly trumpet a 2019 Census Test Report analyzing the impact of a citizenship question on Census self-response rates, *see* Opp. 12-13, 48-49; Abowd Decl. ¶ 13, but that report in fact corroborates Plaintiffs' evidence of the Memorandum's deterrent effect. While the Test Report finds "no statistically-significant depression of [self-]response rates" resulting from a citizenship question in the aggregate, Opp. 12, 48, it also concludes that areas "with greater than 4.9 percent noncitizens" and those "with greater than 49.1 percent Hispanic residents" did exhibit statistically significantly lower response rates, *see* Test Report at *ix-x*, 16-18, 30; *see also* Barreto Reply Decl. ¶¶ 9-12. While Defendants attempt to minimize these findings as pertaining only to "some narrow subgroups," Opp. 13, 48, those subgroups are the ones of relevance here. Plaintiffs' undisputed evidence establishes that all of the Individual Plaintiffs reside in local areas with greater than 4.9 percent noncitizens, and 7 of the 11 Individual Plaintiffs reside in local areas with greater than 49.1 percent Hispanic residents. *See* Gilgenbach Decl. tbl.10. The Test Report—

and the statistical rigor that Defendants and Dr. Abowd ascribe to it, *see* Opp. 48, Abowd Decl. ¶ 13—therefore validates and further strengthens Plaintiffs' evidence of enumeration harms.

Further, by its own terms, the Test Report does not "measure the impact of a citizenship question for the completeness and accuracy of 2020 Census overall." Test Report at 30. Rather, as Dr. Abowd notes, the Test Report is also limited to *self-response* rates and "did not include the [Non-Response Follow-Up] operation." *Id.*; *see* Barreto Reply Decl. ¶¶ 6-8; *see also* Abowd Decl. ¶ 13. Defendants offer no evidence from which a factfinder could reasonably conclude that NRFU operations would fully address these statistically significant discrepancies in response rates in light of the Memorandum. Defendants cite the Test Report's statement that "[c]urrent plans for staffing for [NRFU] would have *sufficiently* accounted for subgroup differences seen in this test," Opp. 48 (emphasis added) (citing Test Report at *x*), but this statement refers to "staffing needs for the NRFU operation," Test Report at 31. As the Test Report disclaims any suggestion that it "measure[s] the impact of a citizenship question . . . overall" including on NRFU operations, it cannot support a contention that NRFU operations would have remedied the disparity in self-response rates that it identifies in disproportionately high Hispanic and noncitizen populations. Certainly, it cannot bear the weight of Defendants' suggestion that NRFU operations would have *fully* ameliorated the significant undercount, as required to undercut Plaintiffs' proof of their enumeration harms.[5]

To the contrary, Plaintiffs' evidence establishes that NRFU operations "will be much more difficult in 2020 given the political climate and the [Memorandum]," and that "non-responding

[5] Neither the Test Report nor Defendants explain the significance of the Test Report's use of the phrase "sufficiently accounted." Test Report at *x*; *see* Barreto Reply Decl. ¶¶ 6-8. Even if this statement could be interpreted to refer to response rates following NRFU, its use of "sufficiently" can only mean an extent that is less than fully. *Cf. Sufficient*, Black's Law Dictionary (11th ed. 2019) ("Adequate; of such quality, number, force, or value as is necessary for a given purpose.").

individuals are also unlikely to respond after household visits by census enumerators because of fear of government interaction." Barreto Decl. ¶¶ 61, 70. Outreach efforts "could actually create more fear and anxiety in immigrant communities and further drive down response rate" given the well-documented "chilling effect" resulting from the "increased presence of government officials who appear to be monitoring immigrants and checking on their status." *Id.* ¶ 71.

Their limited affirmative evidence aside, Defendants offer a smattering of marginal critiques of Plaintiffs' evidence. All of these criticisms reduce to the suggestion that Plaintiffs' evidence should be "better" in some abstract sense, but Defendants tellingly offer little evidence of their own. None of these critiques "calls into question [the] ultimate conclusion" that the Memorandum works enumeration harms on Plaintiffs as a result, and none defeats Plaintiffs' showing of injury-in-fact based on those harms. *Commerce v. House*, 525 U.S. at 331.

Defendants first complain that that Dr. Barreto does not cite a randomized trial testing the Memorandum's effect on response rates, Opp. 12, a complaint that is untethered from the practical realities of this suit. Plaintiffs submitted Dr. Barreto's declaration less than one month after the President issued the Memorandum and one month is not sufficient to conduct the idealized randomized studies of the type that Defendants contemplate. Barreto Reply Decl. ¶ 32; *see, e.g.*, Test Report at *ix* (noting that the Test Report study, published in December 2019, was first conceived in 2018). Dr. Abowd appears to acknowledge such a limitation, opining only that a randomized trial "would be the *best* evidence." Abowd Decl. ¶ 16. No such study is available here, and Defendants offer no evidence—let alone a randomized study satisfying their impracticably high standards—undermining Dr. Barreto's conclusion or the Organizational Plaintiffs' first-hand experience as to the Memorandum's disproportionately deterrent impact on Census participation in Latino and immigrant communities. The Court is entitled to "rel[y] on the best evidence

available and ma[k]e a reasoned judgment on the basis of that record." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 197 (4th Cir. 2009) (emphasis added). The "best evidence available" establishes Plaintiffs' enumeration injuries.

Defendants next fault Dr. Barreto for relying on studies addressing immigrant concerns "about citizenship information in the census" rather than the Memorandum specifically. Opp. 12. But as Dr. Barreto explains, when "asked to assess the impact of a new policy without the time required to conduct field research, the best practice in the social sciences is to A) closely examine the policy and place it within the context of other similar policies; and B) to review what happened when other similar policies were enacted." Barreto Reply Decl. ¶ 32. Here, the "context of other similar policies" is the immediately preceding tactic in Defendants' long-running campaign to reduce the political power of more diverse communities: their attempted inclusion of the citizenship question on the Census questionnaire. Indeed, the Memorandum and the citizenship question each increases distrust of the Census within Latino and immigrant communities and stokes fear of immigration consequences linked to responding to the Census, and the result of such distrust—regardless of source—is a reduced likelihood of Census response. Barreto Decl. ¶¶ 39-62. That is, the Memorandum has "elevated . . . fear in responding to the census by linking [immigration] status to the issue of the census"—just as the citizenship question did. Rodriguez Decl. ¶ 9; *see also* Gilfillan Decl. ¶ 10 ("[The Memorandum] has brought [immigration] concerns regarding the census *back* to the forefront." (emphasis added)). Given this similarity in *how* the citizenship question and the Memorandum both operate to deter responses in Latino and immigrant communities, Defendants' faulting of Dr. Barreto rests on an entirely illusory distinction.[6]

[6] Defendants also critique Dr. Barreto for relying on purportedly hearsay media reports, but even assuming those reports were hearsay, "Defendants are also incorrect in contending that in forming

Finally, asserting that the Organizational Plaintiffs' declarations commit a laundry list of evidentiary sins, Defendants attempt to dismiss them out-of-hand. Opp. 13. But these declarations offer direct accounts of what the Organizational Plaintiffs have encountered in their operations, including community members' states of mind regarding the Census. *E.g.*, Gilfillan Decl. ¶ 9; *see also Ross v. St. Augustine's Coll.*, 103 F.3d 338, 342 (4th Cir. 1996) (noting "established exceptions" to hearsay rule for statements as to "then existing state of mind, emotional condition, or mental feelings . . . under Federal Rules of Evidence 803(1) and 803(3)"). But beyond evidentiary naysaying, Defendants offer no *evidence* of their own rebutting these declarations; the declarations stand as both admissible and unrebutted.

c) The Memorandum Impairs the Organizational Plaintiffs' Activities.

The Memorandum has caused and is causing the Organizational Plaintiffs ongoing injury. In order to complete their work of facilitating individual participation in the Census, the Organizational Plaintiffs have had to expend additional resources to convince Latino and immigrant households to respond. *See Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 622 (4th Cir. 2018) ("[T]he Court has recognized standing to sue on the basis of costs incurred to mitigate or avoid harm when a substantial risk of harm actually exists."). The extra time, staff, and money the Organizational Plaintiffs are expending to convince now reticent individuals to respond to the Census diverts those resources away from reaching more individuals and other organizational projects. Under these circumstances, "there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes

---

his opinions, [Dr. Barreto] was limited to relying on *admissible* evidence." *United States v. Smith*, 919 F.3d 825, 838 n.9 (4th Cir. 2019); *see* Fed. R. Evid. 703.

far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The Organizational Plaintiffs' declarations establish that the Memorandum has "impede[d their] efforts to carry out [their] mission," *Lane*, 703 F.3d at 674, and has therefore affected Organizational Plaintiffs' "ability to operate as an organization." *CASA de Md., Inc. v. Trump*, — F.3d —, 2020 WL 4664820, at *9 (4th Cir. Aug. 5, 2020). Defendants do not dispute that the Organizational Plaintiffs have and are suffering this injury in its brief, nor did they offer any evidence to the contrary. Defendants should therefore be barred from disputing the fact of this injury. *See Structural Grp., Inc. v. Fyfe Co.*, 2016 WL 4537762, at *7 (D. Md. Aug. 30, 2016) ("[Defendant] does not challenge that contention, and so concedes the point."); *High v. R & R Transp., Inc.*, 242 F. Supp. 3d 433, 446 n.12 (M.D.N.C. 2017) ("A party's failure to address an issue in its opposition brief concedes the issue.").

2. Plaintiffs' Injuries Are Traceable to the Memorandum.

In the standing context, causation "requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark*, 572 U.S. at 134 n.6; *see also Libertarian Party of Va. v. Judd*, 718 F.3d 308, 315 (4th Cir. 2013). "Proximate causation is not a requirement of Article III standing," *Lexmark*, 572 U.S. at 134 n.6, and thus "a plaintiff need only show that the defendant's conduct complained of is a 'but for' cause of the plaintiff's alleged injury," *Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998) (three-judge court), *aff'd*, 525 U.S. 316; *see Finkelman v. Nat'l Football League*, 877 F.3d 504, 510 (3d Cir. 2017) (similar). Traceability "does not require the challenged action to be the sole or even immediate cause of the injury." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018).

As to Plaintiffs' enumeration harms, Plaintiffs' evidence establishes the chain of causation from the Memorandum's especially-pronounced deterrent effect on Census participation in Latino

and immigrant communities to the funding and further apportionment harms being inflicted on the Individual Plaintiffs. There is no deterrent effect resulting from the Memorandum without the Memorandum itself, and there is no marginal undercount disproportionately affecting Plaintiffs' areas without the Memorandum's deterrent effect. The Memorandum is thus unquestionably a but-for cause of Plaintiffs' injuries.

Defendants instead attempt to attribute the Memorandum's deterrent effect *solely* to certain community activists and media organizations that Dr. Barreto identifies. Opp. 15. But media sources simply "reported on the PM's intention to leave out undocumented immigrants from the reapportionment process" and "conveyed to Spanish-speaking audiences that millions of undocumented immigrants living in the U.S. would not be counted" for apportionment—statements that are undisputedly true. Barreto Decl. ¶ 32. While these media reports also reported that individuals "stated that they believed the [Memorandum] was an effort to sow confusion and distrust," *id.* ¶ 33, the chilling effect that Dr. Barreto identifies stems from the Memorandum's "clear message of exclusion" and "signal of government monitoring citizenship status as it relates to the 2020 Census population count." Barreto Decl. ¶¶ 14, 18, 29.

Defendants' blame-the-messenger theory of causation "wrongly equates injury 'fairly traceable' to the defendant with injury as to which [their] actions are the very last step in the chain of causation," *Sierra Club*, 899 F.3d at 284 (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)), and is little more than a suggestion that media sources should *not* report on official actions taken by the President. The dubious merits of that suggestion aside, it does not defeat traceability. "[T]he predictable effect of Government action" on third parties—here the news media—is that they will report on newsworthy government actions. *New York II*, 139 S. Ct. at 2566.

Defendants also devote substantial effort into establishing the confidentiality of the Census, Opp. 15, contending that these legal requirements somehow break the causal chain. "[N]othing in the Memorandum undermines these statutory protections," *id.* at 15, but the exact same proposition held true for the citizenship question considered in *New York II*. The Supreme Court rejected the argument that traceability is defeated by "intervening, unlawful third-party action"—census non-response—"motivated by unfounded fears that the Federal Government will itself break the law by using noncitizens' answers against them for law enforcement purposes." *New York II*, 139 S. Ct. at 2566. Defendants' recycling here of that already-rejected argument fares no better.

3. Plaintiffs' Injuries Are Redressable by a Favorable Decision.

Standing's "redressability requirement [is] satisfied when the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *Carter v. Fleming*, 879 F.3d 132, 138 (4th Cir. 2018) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007)). Plaintiffs "need not show that a favorable decision will relieve his every injury," *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), as "[c]omplete redressability is not required" to establish standing, *S. Envt'l Law Ctr. v. Bernhardt*, 432 F. Supp. 3d 626, 634 (W.D. Va. 2020) (quoting *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012)); *see also Defs. of Wildlife*, 504 U.S. at 569 n.4 (redressability does not require "complete relief"). Redressability is also "not a demand for mathematical certainty," *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 602 (2d Cir. 2016) (quoting *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 143 (3d Cir. 2009)), and "no explicit guarantee of redress to a plaintiff is required," *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011).

Redressability is thus established because "an injury" that Plaintiffs are suffering or likely to suffer—their vote-dilution harms—"is likely to be redressed by a favorable decision." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see Larson*, 456 U.S. at 243 n.15.

Plaintiffs' enumeration harms are also redressable. As Dr. Barreto explains, "subsequent official action to counteract such threats—either court orders or changes in agency policy—have positive effects on trust and engagement." Barreto Decl. ¶ 14. The reduction of *some* fear and mistrust in Latino and immigrant communities from currently high levels, which thereby increases Census participation, which would follow "a favorable decision would relieve [Plaintiffs'] problem 'to some extent,' which is all the law requires." *Consumer Data*, 678 F.3d at 903; *see also Carter*, 879 F.3d at 138. Defendants' insistence to the contrary, that a favorable decision *must* increase participation by "enough" noncitizens, Opp. 17, reduces to no more than a legally untenable demand for an "explicit guarantee of redress," *Equity in Athletics*, 639 F.3d at 100.

Defendants further invite the Court to speculate that a favorable decision may not redress these injuries because it is subject to appellate review, Opp. 17, but appellate review is a specter looming over all judicial decisions except those of the Supreme Court. In any event, redressability is "based on the availability of relief at a given step," *Mantena v. Johnson*, 809 F.3d 721, 731 (2d Cir. 2015) (citation omitted), and is not defeated by the possibility that any relief awarded would be undercut by subsequent events, *see Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996).

B. Plaintiffs' Claims Are Ripe for Review.

Defendants' further assertion that this case is not ripe for review fails regardless of whether it is constitutionally or prudentially based. Ripeness depends on "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). This analysis "is similar to determining whether a party has standing," *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006), and "overlaps with" standing "in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical," *In re Methyl*

Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 110 (2d Cir. 2013) (citation omitted). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319.

Defendants' ripeness arguments wholesale ignore the enumeration harms that Plaintiffs are suffering injuries *right now*, and, given the overlap between ripeness and standing principles, are unavailing as to Plaintiffs' apportionment harms for the same reasons those harms are cognizable injuries-in-fact. *See supra* section I.A.1. Furthermore, none of the three ripeness factors counsels in favor of deferring adjudication of Plaintiffs' claims.

First, delayed review would impose significant hardship on Plaintiffs. Plaintiffs have established harms based on the *ongoing conduct* of the Census, and it is thus "not necessary" for the Court "to wait until the [tabulation] has been conducted" to consider challenges to Defendants' announced policy "because such a pause would result in extreme—possibly irremediable—hardship." *NAACP v. Bureau of the Census*, 945 F.3d 183, 192 (4th Cir. 2019) (citation omitted). Indeed, correcting the disproportionate undercount of Latino and immigrant communities caused by the Memorandum would be difficult after the Census has been completed. *See* Pls.' Mem. 24-34 (identifying the Memorandum's infliction of irreparable harms on Plaintiffs); *see also U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 88 (D.D.C. 1998) (three-judge court) (noting irreparable harms resulting from an invalid census), *aff'd*, 525 U.S. 316.

Second, Plaintiffs' claims under the Apportionment and Enumeration Clauses, 13 U.S.C. § 141, and 2 U.S.C. § 2a present pure questions of law, as made plain by the paucity of evidence that Defendants submitted addressing the merits of those claims. Plaintiffs' claims can thus be decided right now based on the strictly legal exercise of constitutional and statutory interpretation.

Finally, judicial intervention would not inappropriately interfere with administrative action. This factor carries less weight in the Fourth Circuit's ripeness analysis, *see, e.g.*, *NAACP*, 945 F.3d at 192 (ripeness "generally turns on two considerations: (1) the fitness of the issues presented for judicial review; and (2) the hardship that the parties would endure by delayed adjudication"), and particularly, as here, where the first two considerations weigh in favor of review. Given that Defendants have disclaimed any impact of the Memorandum on Census procedures, *see, e.g.*, Fontenot Decl. ¶ 13, judicial intervention presents no risk of interference in the conduct of the Census or any resulting apportionment. And even if the Memorandum did impact those procedures, ripeness does not require "courts 'to wait until the census has been conducted' to consider challenges to the Census Bureau's planned procedures," *NAACP*, 945 F.3d at 193 (quoting *Commerce v. House*, 525 U.S. at 332, and citing *New York II*, 139 S. Ct. at 2561). Taken together, the *Ohio Forestry* factors weigh in favor of, not against, review.

Defendants also argue that apportionment challenges are "usually" decided post-apportionment, but none of Defendants' cited authorities hold that plaintiffs *must* bring an apportionment challenge after the fact. Indeed, *Utah v. Evans* contemplated post-apportionment suits by plaintiffs who "did not learn about [the challenged practice's] representational consequences until after the census . . . and hence had little, if any, incentive to bring a precensus action," and proceeded to *reject* a distinction between pre-census and post-census apportionment challenges. 536 U.S. 452, 462-63 (2002). The legally relevant question is not what constitutes usual practice, but rather whether at least one Plaintiff here has been subject to an actual apportionment harm or a threatened apportionment harm that is substantially likely. Plaintiffs' uncontroverted evidence that California and Texas are virtually certain to lose representation based

on the Memorandum's announced policy—and the undisputed fact that several of the Individual Plaintiffs reside in California and Texas—establishes precisely such a harm.

II. Plaintiffs Are Entitled to Summary Judgment on Their Apportionment Claims.

Plaintiffs are entitled to summary judgment on their apportionment claims on both constitutional and statutory grounds. Although courts often avoid constitutional questions if a case may be decided on purely statutory grounds, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), this Court can and should decide Plaintiffs' constitutional claims before considering their statutory challenge. Constitutional avoidance "is a rule of prudence, not an absolute command." *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 351 (4th Cir. 2018) (Harris, J., concurring) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993)). Where "the statutory inquiry . . . is deeply intertwined with questions of constitutional law," there is good reason to reach the constitutional issue first. *Id.* Here, the statutory framework alone provides a sufficient basis to grant Plaintiffs' motion. Because the language of the Census Act is informed by the constitutional provisions governing the census, "there is no avoiding" Plaintiffs' constitutional claims "through a statutory disposition." *Id.*

A. The Constitution Requires Defendants to Include All Inhabitants in the Apportionment Base.

The Fourteenth Amendment to the U.S. Constitution requires the government to establish an apportionment based on "the whole number of persons in each State." U.S. Const. amend. XIV, § 2. By declaring the President's intention to exclude undocumented immigrants—persons who undeniably reside "in" the United States—categorically on the basis of their "unlawful immigrant status" alone, the Memorandum violates this constitutional command as a matter of law.

Lacking any plausible defense of this categorical exclusion under the Constitution, Defendants instead attempt to saddle Plaintiffs with an impossible—and legally unfounded—

burden of proof. Ignoring what the Memorandum states as "policy" and peremptory direction, Defendants try to move the goalposts by claiming that Plaintiffs "must establish that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment." Opp. at 36. The sole asserted authority for this convenient recasting of Plaintiffs' burden is the Fourth Circuit's decision in *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012), which involved a "facial challenge" to a statute enacted by Congress, not a unilateral presidential memorandum. While it is true enough that facial challenges to statutes impose a high burden, *see United States v. Salerno*, 481 U.S. 739, 745 (1987), Defendants cite "no authority for applying the standards for facial challenges to the constitutionality of statutes to claims, like those here, that the President has exceeded the authority granted to him by Congress," *New York v. Trump*, 2020 WL 5422959, at *29 n.16. Indeed, "[i]t is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (internal quotation marks omitted). Facial challenges to statutes thus "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). In stark contrast, the Memorandum is a unilateral executive edict declaring an expressly unconstitutional (and *ultra vires*) policy and intention to implement that policy in a manner *inconsistent* with the Constitution.

The Memorandum does not contemplate excluding some tailored subgroup of undocumented immigrants whose circumstances plausibly might not meet the criteria of residence (unrelated to legal immigration status) in one of the 50 states. To the contrary, the Memorandum announces a policy to exclude "aliens who are not in a lawful immigration status" categorically, on the basis of that status and "to the maximum extent feasible." Memorandum § 2.

Defendants' speculation that they may lawfully exclude immigrants "who have been detained for illegal entry" and "are subject to final orders of removal" is no response. Opp. 31. In those cases, the immigrants are not being excluded solely because of their immigration status. Instead, they "are arguably excluded (or excludable) based on their 'usual residence,' not their legal status." *New York v. Trump*, 2020 WL 5422959, at *29 n.16. The Memorandum "unambiguously commands action" toward implementing an unlawful goal, and there is far "more than a mere possibility" that Defendants will supply the President with data—of whatever quality—that he will deem adequate to execute that goal. *Cf. San Francisco*, 897 F.3d at 1240 (evaluating legality of presidential command that could result in "suspect" agency action). There is no basis in law or logic for not taking the Memorandum at its word.

Defendants all but concede that the Memorandum's announced policy flies in the face of the consistent historical interpretation and application of the Apportionment Clause. "The debates at the [Constitutional] Convention make at least one fact abundantly clear: . . . when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). The Framers of both Article I and the Fourteenth Amendment purposefully included all "persons" in the apportionment base. By committing to count "the whole number of persons in each State," the Framers acknowledged that House members represent all "persons" in their districts, not just the voting population. *See* Pls.' Mem. 11-12 (citing Cong. Globe, 39th Cong., 1st Sess. 141 (1866)). The Framers knew full well that "the whole number of persons in each State" would include immigrants. *See id.* at 12 (citing 71 Cong. Rec. 1910 (May 25, 1929) (Sen. Bratton)). In an astonishing admission, Defendants have conceded they cannot identify any historical evidence whatsoever that any branch of the United

States government has ever taken the position that it would be lawful to exclude all undocumented immigrants from the apportionment base—until now. *See New York v. Trump*, 2020 WL 5422959, at *32.

Faced with this void, Defendants go to great lengths to locate some historical indicia of legitimacy for their assertion that an undocumented immigrant may be deemed not "*in* a State" or an "inhabitant" without first having "a sovereign's permission to enter and remain." Opp. 29. But they are forced to stretch beyond the breaking point of credibility, relying on an observation by James Madison in *The Federalist* about a provision of the pre-constitutional Articles of Confederation and a passing reference of Chief Justice Marshall in an 1814 concurring opinion unrelated to apportionment. *See* Opp. 29. Equally strained is Defendants' effort to circumvent the Supreme Court's opinion in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2016), by noting that *Evenwel* does not address "how 'inhabitant' may be defined." Opp. 35. Even if the Court's opinion did not gloss the specific limits of that particular term, however, *Evenwel* clearly endorsed redistricting on the basis of "total population," 136 S. Ct. at 1123, including undocumented immigrants, *see* Br. of Amicus Curiae Immigration Reform Law Inst. in Supp. of Appellants, *Evenwel*, No. 14-940, 2015 WL 4747986 (U.S. Aug. 7, 2015). Defendants' effort to carve out millions of persons from the apportionment based on an idiosyncratic and radically disembodied definition of "inhabitant" cannot be squared with Supreme Court precedent.

Rather than fully grappling with *Evenwel*, Defendants dust off discredited antiques of early immigration law such as *Kaplan v. Tod*, 267 U.S. 228 (1925), a case in which a Russian child was denied entry at Ellis Island in 1914. Immigration authorities ordered the child to be excluded after certifying she was "feeble minded." *Id.* at 229. But because she could not be returned to Russia in the midst of World War I, she was paroled to a Hebrew immigrant aid society, which agreed "to

accept custody . . . until she could be deported safely." *Id.* The immigrant aid society allowed the child to live with her father, who had been admitted and eventually became naturalized. *Id.* Years later, when the government sought to deport the child, the immigrant argued that she was entitled to citizenship by virtue of her father's naturalization and could not be deported after being present in the United States for more than five years. *Id.* at 230. The Court rejected that argument, based entirely on the fact that" the immigrant had been "categorically excluded from admission to the United States from the moment [she] set foot here," *Ashton v. Gonzales*, 431 F.3d 95, 99 (2d Cir. 2005); *see Kaplan*, 267 U.S. at 229-30. Under the immigration law regime at the time, legal exclusion stopped the naturalization clock from running.

While *Kaplan* may stand for the proposition "that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States," *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958); *see id.* at 189 (citing *Kaplan*, 267 U.S. at 230), the relevance of *Kaplan* here is tenuous at best. Indeed, courts now treat *Kaplan* as "outdated" and "'unhelpful' in interpreting" even modern *immigration* law, *Nwozuzu v. Holder*, 726 F.3d 323, 330 n.6 (2d Cir. 2013) (emphasis added), regarding it as little more than a relic of a darker time when the government categorically excluded immigrants based on mental disability. In any event, not all undocumented immigrants are in the same situation as the daughter in *Kaplan*: "[M]any people initially designated as 'undocumented'—including many intercepted at the border—ultimately obtain lawful status, such as asylum." *New York v. Trump*, 2020 WL 5422959, at *30 (citing Exec. Office for Immigration Review, U.S. Dep't of Justice, Statistics Yearbook Fiscal Year 2018, at 27 (2019)). *Kaplan* says nothing about the constitutional obligation to all people residing in the United States, without regard to immigration status, under the Apportionment Clause.

Finally, Defendants invoke *Franklin v. Massachusetts*, 505 U.S. 788, but *Franklin* does not support their argument. *Franklin* upheld the Census Bureau's discretion to include overseas military personnel in the apportionment base because they could reasonably be considered "usual residents of the United States" and had maintained their "ties to their home States" during their temporary postings abroad. *Id.* at 806. Nothing in *Franklin*, however, suggest that the President's discretion is unlimited. The Court acknowledged that the Census Bureau must count all persons who usually reside in a State, and that "usual residence" for purposes of counting inhabitants is a term that held "broad connotations." *Id.* at 805. Moreover, *Franklin* itself did not involve *any* exercise of discretion by the President at all: its entire discussion of presidential discretion arose in the context of determining whether the Secretary's delivery of her report under 13 U.S.C. § 141 constituted "final agency action" under the APA. *Id.* at 799-800. The only exercise of policy judgment under review in *Franklin* had been made *by the Secretary*. *See id.* at 793-95. Nor has any actual exercise by the President of the kind of discretion hypothesized in *Franklin* has been specifically approved since then.

Defendants take the sensible principle of *Franklin* and turn it on its head by purporting to interpret "usual residence" to *exclude* individuals who *are* physically present in the United States and intend to remain. Such an interpretation cannot be squared with *Franklin*. The Court acknowledged in *Franklin* that the government has some discretion to decide *which* State an individual resides in for purposes of the apportionment. *Id.* at 805-06. The government may likewise decide whether military personnel stationed abroad may still be treated as a resident of a State. Nothing in *Franklin* supports the notion that the Census Bureau has the discretion to entirely exclude from the apportionment base individuals who live in the United States and do not intend to leave in the near future. No reasonable interpretation of "inhabitant" can support that conclusion.

"[H]owever ambiguous the term may be on the margins, it surely encompasses [undocumented immigrants] who live in the United States—as millions of [undocumented immigrants] indisputably do, some for many years or even decades." *New York v. Trump*, 2020 WL 5422959, at *29.

Defendants thus have it backwards when they treat undocumented immigrants who reside in the United States as "noninhabitants" because they purportedly lack "allegiance or enduring tie[s]" to this country. Opp. 35 (quoting *Franklin*, 505 U.S. at 804). *Franklin* held it was permissible to include overseas employees because they had developed a tie to their home state that endured even when they lived abroad. By that logic, undocumented immigrants have *also* developed a tie to the United States that endures even though they may be directed to leave. Other than a single line cherry-picked from *The Law of Nations*, Opp. 35, Defendants have no basis whatsoever to assert that undocumented immigrants lacks "allegiance or enduring tie[s]" to this country. Indeed, under Defendants' boundless theory, they could exclude *any* category of persons that the President in his unilateral discretion decides lacks allegiance to the United States. The specter of arbitrary and oppressive discrimination that Defendants' theory raises cannot be what the Framers and subsequent adopters of the Fourteenth Amendment envisioned. *Cf. Utah v. Evans*, 536 U.S. at 500 (Thomas, J., concurring in part and dissenting in part) (noting the Framers' desire to avoid "political chicanery").

Defendants' remaining counterarguments are equally unavailing. Defendants all but ignore Plaintiffs' contention that undocumented immigrants should be treated as "inhabitants" of the United States under the Department of Commerce's Residence Rule. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018). According to the Residence Rule, the 2020 Census must follow the "constitutional and statutory mandates to count

all residents of the several states" by enumerating all persons "in accordance with the concept of 'usual residence,'" that is, "the place where a person lives and sleeps most of the time." *Id.* at 5526. The Residence Rule makes no reference to an individual's immigration status, as that does not affect where that individual "lives and sleeps most of the time." Defendants claim in a footnote the Memorandum is somehow consistent with the Residence Rule because "the Census Bureau always planned to exclude some people from the 2020 Census without a 'usual residence' in a particular State." Opp. 38 n.10. But this completely misses the point. The Residence Rule itself makes clear that an undocumented immigrant who "lives and sleeps" at a location in the United States has a "usual residence" in a particular State and therefore must be counted.

Defendants also claim the Framers did not anticipate undocumented immigrants would be included in the apportionment base because the first federal immigration law was not enacted until after the Fourteenth Amendment. Opp. at 32. This ignores, however, that several States had immigration laws that predated the Fourteenth Amendment. *See, e.g.*, Ch. 195, § 3, 1847 N.Y. Laws 182, 184; *see also* Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 3 Law & Hist. Rev. 583, 622-25 (2001) (describing Massachusetts' immigration laws from 1840 to 1860). There is no evidence that the Framers would have intended immigrants that were not lawfully present in those states to be excluded from the apportionment base. To the contrary, including immigrants in the apportionment base was seen as necessary to avoid punishing States with larger immigrant populations. *See* Cong. Globe, 39th Cong., 1st Sess. 1256 (1866) (objecting to proposal to base apportionment base on voting population because it would "throw out of the basis two and half millions of unnaturalized foreign-born men and women" and cost Massachusetts House seats).

Defendants are similarly wrong to suggest the Framers included immigrants only because, at that time, immigrants could easily obtain citizenship. According to Defendants, immigrants could become naturalized citizens by taking an oath of loyalty and satisfying a five-year residency requirement. Opp. 34 (citing Act of Apr. 14, 1802, 2 Stat. 153). Defendants claim that rationale does not extend to undocumented immigrants, "who generally are prohibited by law from becoming citizens and are subject to removal." *Id.* Defendants' claim relies on speculation on what the Framers would have wanted, if they were aware of subsequent trends in immigration policy. "But the original meaning of the Constitution cannot turn on modern necessity." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634-635 (2008). Here, the history of the Apportionment Clause makes clear that the Memorandum's determination to exclude an entire category of inhabitants from the apportionment base is unconstitutional.

B. The Census Act Likewise Requires Defendants to Include All Inhabitants in the Apportionment Base.

Separate and apart from the constitutional violation discussed above, the Memorandum also contravenes the clear statutory requirements of the Census Act. Congress included language in 2 U.S.C. § 2a(a) that precisely mirrors the Fourteenth Amendment's Apportionment Clause. It directs the President to transmit an apportionment statement "showing the whole number of persons in each State, excluding Indians not taxed." 2 U.S.C. § 2a(a). And because "Congress is presumed to enact legislation with knowledge of the law," *Fed. Fin. Co. v. Hall*, 108 F.3d 46, 50 (4th Cir. 1997) (citation omitted), there is no reason this statutory language should be interpreted differently from the Apportionment Clause.

If anything, the statutory history of § 2a(a) makes it even clearer that the Memorandum is unlawful. Before enacting what is now 2 U.S.C. § 2a(a), Congress expressly considered legislation "excluding aliens from enumeration for the purposes of apportionment," but was advised that "there is no constitutional authority" for doing so. 71 Cong. Rec. 1822 (May 23, 1929). Congress therefore adopted statutory language mirroring the Apportionment Clause's broad inclusion of all "persons" without reference to their immigration status. And unlike the Framers of the Fourteenth Amendment, who drafted that provision at a time when immigration policy was handled by each State, Congress drafted § 2a(a) at a time when federal immigration law excluded entire categories of immigrants. *See, e.g.*, Chinese Exclusion Act, Pub. L. No. 47-126, § 14, 22 Stat. 59, 61 (1882) (precluding Chinese immigrants from receiving citizenship). Nevertheless, Congress adopted word-for-word the broad language of the Apportionment Clause, negating any inference that undocumented immigrants could lawfully be excluded from the apportionment base.

The Census Act further imposes a parallel obligation on the Secretary of Commerce, who must report the "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress." 13 U.S.C. § 141(b). The Act thus requires the Secretary and the President to base the apportionment on the "total population," *i.e.*, the "whole number of persons in each State." The Memorandum violates these statutory commands by directing the Census Bureau to produce *two* tabulations: one comprising the total population, and a second that excludes undocumented immigrants. Opp. 4; *see* Memorandum § 3. But the text of § 141(b) is clear. The tabulation "required for . . . apportionment" must be a "tabulation of total population by States."

Defendants have no persuasive response to this plain reading of the Census Act. They repeat the same strained interpretation of the terms "inhabitant" and "usual residence" as somehow excluding undocumented immigrants. *See* Opp. 37-38. But, as noted above, this reading is

unavailing under the text of the Apportionment Clause and has never been adopted by any branch of government. To the contrary, it violates both the plain meaning of those terms and more than two centuries of unbroken constitutional interpretation and practice.

In sum, the Memorandum announces a policy that, on its face and as Defendants are now working to implement, violates both the Apportionment Clause of the Fourteenth Amendment and the clear text of the Census Act. Defendants' effort to recruit the terms "inhabitant" and "usual residence" to draw a chalk circle around millions of people who have long lived in the United States and intend to stay cannot be squared with the constitutional or statutory text. Plaintiffs are thus entitled to summary judgment on this basis alone. *See New York v. Trump*, 2020 WL 5422959, at *32.

III. Plaintiffs Are Entitled to Summary Judgment on Their Enumeration Clause Claim.

Remarkably, Defendants do not directly address Plaintiffs' second argument for summary judgment—that the Memorandum seeks to apportion congressional seats based on data that is not "ascertained under the . . . decennial census." 2 U.S.C. § 2a(a); *see* Pl.'s Mem. 18-20. It is therefore difficult to decipher the grounds on which they oppose this part of Plaintiffs' motion. Indeed, Defendants' opposition brief does more to bolster than refute the merits of Plaintiffs' argument that the Memorandum unlawfully seeks to base apportionment on extra-Census data. Defendants squarely admit that the Memorandum has "no impact on the design of field operations for [the] decennial census, or on the Census Bureau's commitment to count each person in their usual place of residence, as defined in the Residence [Rule]." Fontenot Decl. ¶ 13. Pursuant to the Residence Rule, which "determine[s] where people are counted during each decennial census," the Census population count will include all undocumented immigrants whose usual residence is in the United States. 83 Fed. Reg. at 5533. But as Defendants concede, the Memorandum directs the Secretary

of Commerce to submit to the President a *separate* population count excluding undocumented immigrants for purposes of apportionment. Opp. 4, 9.

That the Memorandum directs the apportionment of congressional seats based on *non*-decennial census data is therefore undisputed. So too is the fact that this runs afoul of the statutory requirement that the President's report of statewide population totals for apportionment be as "ascertained under the . . . decennial census." 2 U.S.C. § 2a. The government has conceded this very point in litigation before another federal court challenging the constitutionality of the Residence Rule. *See* Defs.' Objections & Responses to Intervenor-Defs.' Interrogatories at 3-4, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-772 (N.D. Ala. July 24, 2020), ECF No. 156-1 ("[2 U.S.C. § 2a(a)] on its face *requires that any apportionment count be derived from the decennial census*, which Congress authorized the Secretary of Commerce to conduct pursuant to standards specified in 13 U.S.C. § 141." (emphasis added)).

Furthermore, Defendants do not dispute that failing to base apportionment on the decennial census is not just an *ultra vires* violation of the statute, but is unconstitutional because the Enumeration Clause mandates the apportionment of congressional seats based on a decennial enumeration, "as Congress shall by law direct"—which authority Congress has exercised by directing the Secretary of Commerce to undertake the "decennial census," 13 U.S.C. § 141, on which the President's apportionment counts must be based, *see* 2 U.S.C. § 2a(a).[7]

Franklin, which Defendants point to as purportedly confirming the broad scope of Presidential discretion over apportionment, *see* Opp. 38-39, does nothing to defeat Plaintiffs'

[7] Contrary to the government's assertion, Plaintiffs have not argued "that the numbers used for apportionment must be derived solely from individual responses to the census questionnaire." Opp. 39. Rather, Plaintiffs have noted simply that the questionnaire reflects what the Residence Rule establishes and the government readily admits—that the ongoing decennial census is not gathering data on immigration status.

argument that apportionment must be based on decennial census data. To the contrary, *Franklin* affirms that 2 U.S.C. § 2a "expressly require[s] the President to use . . . the data from the 'decennial census.'" 505 U.S. at 797. Although Defendants cite *Franklin*'s indication that "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census,'" Opp. 38 (quoting *Franklin*, 505 U.S. at 799), the Memorandum does *not* express a policy judgment about what *results in* the Census. Rather, it attempts to *circumvent* the Census by apportioning House seats (and electoral votes) on the basis of numbers other than those generated by, or derived from, the actual Census enumeration mandated by the Constitution.

Furthermore, *Franklin* does not directly address a specific Presidential decision to adjust the data reported to him by the Secretary—much less endorse a Presidential attempt to manufacture and use an entirely different, non-Census dataset. Rather, the *Franklin* Court was reviewing a three-judge panel's ruling that the Secretary of Commerce's methodology for allocating overseas military personnel to specific states was "arbitrary and capricious" and thus a violation of the Administrative Procedure Act ("APA"). *See* 505 U.S. at 790-91, 799-800. The Court concluded that the Secretary's methodology was not a "final agency action" that could be challenged under the APA because, by statute, the numbers reported by the Secretary were not legally binding until they were transmitted by the President to Congress. *Id.* at 796. That question of "final agency action" is irrelevant to Plaintiffs' argument here, which is predicated on the Enumeration Clause and the relevant statutory framework.[8]

[8] Defendants' reliance on *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002), and *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), is misplaced. Both cases arose outside the Census context and address only what constitutes "final agency action" under the APA, and neither has any relationship to the Enumeration Clause or its corresponding statutory framework. *Alabama v. Dep't of Commerce*, 396 F. Supp. 3d 1044 (N.D. Ala. 2019), is likewise inapt. That decision notes that, to the extent that the President has authority to deviate from "the Secretary's tabulation of the states' total populations," he may do so

IV. Plaintiffs Are Likely to Succeed on the Merits of Their Equal Protection Claim.

Defendants do not dispute that the Memorandum will have a disparate impact on Hispanic communities. *See* Opp. 20-21. Instead, they argue disparate impact is not enough here because the Memorandum is "facially neutral with respect to race, ethnicity, and national origin." *Id.* at 20. Even assuming that is true, Defendants' narrow focus on the text of the Memorandum ignores the forest for the trees. The Memorandum is not a *sui generis* executive action that must be evaluated in isolation. To the contrary, it is the culmination of a years-long campaign to "to dilute the voting power of non-whites, Hispanics, and immigrants of color, and to shift political power to non-Hispanic whites." First Am. Compl. ¶ 66, ECF No. 18 ("FAC"). From the very outset of the Trump Administration, Defendants worked behind the scenes to exclude noncitizens from the 2020 Census, with the *express* intent of advantaging "Non-Hispanic Whites." FAC ¶ 68. Equal protection claims often require a probing, fact-specific inquiry to determine if a facially neutral action is merely a wolf in sheep's clothing. But that is not the case here; "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Defendants have two primary responses to these allegations of discriminatory intent. *First*, they claim that the inference of intent raised by the Memorandum taken together with Secretary Ross's decision to add a citizenship question to the 2020 Census is implausible, because they involved "separate decisions" that were "distinct in timing and implementation." Opp. 21. But the timing of the decisions confirms that they were part of the same unlawful scheme. The President issued the 2019 Executive Order directing agencies to gather data on the number of undocumented

---

"insomuch as the Secretary's tabulation rests on 'policy judgments' concerning how best to determine the total population of each state." *Id.* at 1055 (quoting *Franklin*, 505 U.S. at 799). As explained, the President's decision here is *not* a policy judgment about "how best to determine the total population," but rather an attempt to *avoid* apportionment based on the total population.

immigrants in the country only *two weeks* after the Supreme Court scuttled Defendants' plans to include a citizenship question on the 2020 Census. Executive Order 13880, Collecting Information About Citizenship Status in Connection With the Decennial Census, 84 Fed. Reg. 33821, 33821 (July 11, 2019) (the "2019 Executive Order"). When announcing the 2019 Executive Order, the President made clear it was a response to the Supreme Court's decision, declaring "I'm here to say we are not backing down on our effort to determine the citizenship status of the United States population."[9] A year later, the President issued the Memorandum, which explicitly references the data gathered by the 2019 Executive Order. Memorandum § 1. Defendants' assertion that the timing of these decisions was "distinct" strains credulity.

Second, Defendants argue Plaintiffs are foreclosed from relying on the evidence of discriminatory intent in connection with the citizenship question because another court concluded in a lawsuit challenging the citizenship question that plaintiffs there "failed to prove" Defendants' decision was motivated by "a discriminatory purpose." Opp. 21 (citing *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019)). But Defendants fail to acknowledge that the district court reached this conclusion *before* evidence from the Hofeller files exposed Defendants' discriminatory intent. Indeed, Defendants are forced to acknowledge that Judge Hazel in this district reviewed the "newly discovered evidence" and reopened the plaintiffs' equal protection claim because the evidence suggested "Dr. Hofeller was motivated" by a desire "to advantage Republicans by diminishing Hispanics' political power." Opp. 21 n.2 (quoting *Kravitz v. Dep't of Commerce*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF No. 162-1 at 1). Defendants' assertion that this claim was already rejected in the citizenship-question litigation is simply false.

[9] Remarks by President Trump on Citizenship and the Census (July 11, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

The undisputed sequence of events set forth in the Complaint are more than enough to warrant a preliminary injunction. Defendants spent years plotting to include a citizenship question on the 2020 Census. Anticipating a legal challenge to their unlawful action, they concocted a pretextual explanation: that including the question on the Census was necessary to enforce the Voting Rights Act. When the Supreme Court rejected this explanation, Defendants dropped it and barreled forward with the same discriminatory scheme. To this day, Defendants have offered no explanation for their earlier misrepresentation. If, as Defendants now claim, the purpose of this initiative was always to promote "the principles of representative democracy underpinning our system of Government," Opp. 22 (quoting Memorandum § 2), they could have said so years ago rather than representing to this Court and the Supreme Court that this was all aimed at enforcing the Voting Rights Act. It is reasonable to "infer from the falsity of the[ir] [original] explanation that [Defendants were] dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *accord Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1382 (10th Cir. 1994). Here, that discriminatory purpose is clear. Defendants wish to exclude undocumented immigrants from the apportionment base to advantage non-Hispanic Whites. Plaintiffs are thus likely to succeed on their claim that the Memorandum violates the Constitution's Equal Protection Guarantee.

V. Plaintiffs Are Entitled to Relief, Including an Injunction.

A. Plaintiffs Have Demonstrated They Will Be Irreparably Harmed If the Memorandum Is Not Enjoined.

Plaintiffs established three types of harms supporting not only their standing but also their irreparable harm: (1) a vote-dilution harm based on the states where several of the Individual Plaintiffs reside being apportioned fewer congressional seats pursuant to the policy announced in the Memorandum; (2) enumeration harms resulting from the Memorandum's deterrent effect on

Census participation that is particularly pronounced in Plaintiffs' communities; and (3) harm to the Organizational Plaintiffs by impairing their organizational activities and making the conduct of those activities more costly. Defendants' repackaged justiciability arguments, *see* Opp. 46-49, equally fail at defeating Plaintiffs' showings of irreparable harm.

Plaintiffs' vote-dilution harms resulting from the malapportionment directed by the Memorandum are imminent as established above. Defendants contend that harms based on malapportionment can be remedied as late as six years after the apportionment in question, *see* Opp. 45 (citing *Wisconsin v. City of New York*, 517 U.S. 1 (1996)), but this contention ignores that any elections—and activity leading up to those elections—taking place under the specter of malapportionment are not re-conducted. The dilution of Plaintiffs' votes is a threatened harm that is constitutional in magnitude, Pls.' Mem. 26-28—a characteristic that Defendants do not dispute. These harms thus constitute irreparable harm. *See Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987).

The enumeration harms and harms to Organizational Plaintiffs are also imminent and irreparable. Plaintiffs' evidence demonstrates that the Memorandum is affecting the conduct of the Census *on an ongoing basis* by particularly deterring participation in Latino and immigrant communities. This deterrent effect translates to funding and further vote-dilution harms to the Individual Plaintiffs and impairs—also on an ongoing basis—the Organizational Plaintiffs' activities. Beyond denying their existence, Defendants nowhere argue that these harms can be compensated through monetary damages that are not "difficult to ascertain." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994). They are not monetarily compensable, and even if they were, "the impossibility of ascertaining with any

accuracy the extent of the loss" renders them irreparable nonetheless. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (citation omitted).

B. The Balance of Equities and Public Interest Favor an Injunction.

Defendants do not dispute that the equitable factors merge here because "the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Nor do they dispute that the public interest is served not only by an accurate census, *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980), but also by governmental compliance with "the federal laws that govern [its] existence and operations," *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citation omitted). Given that Plaintiffs are suffering irreparable harms and that the requested injunction would be directed at executive conduct that violates both the Constitution and applicable statutes, Pls.' Mem. 35, the equitable factors tip strongly in Plaintiffs' favor.

The only offsetting harm that Defendants identify is the purported infringement on the President's claimed discretion in conducting apportionment, Opp. 49-50, a harm that is ultimately illusory. The Constitution and the Census Act truncate any presidential discretion in conducting the Census well short of the Memorandum's announced policy to exclude all undocumented immigrants from the apportionment count based on extra-Census estimates of their numbers, and Defendants identify no authority supporting the notion that limiting the President's discretion to the metes and bounds set by the Constitution and statutory law somehow harms Defendants. "[T]he President is bound to abide by the requirements of duly enacted and otherwise constitutional statutes," *Swan*, 100 F.3d at 977, and "[n]o government official, after all, possesses the discretion to act unconstitutionally," *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018) (identifying no "judicial interference in executive affairs presented by . . . directing the President to comply with constitutional restrictions"), *aff'd*, 928 F.3d 226 (2d Cir. 2019).

C. The Court May Also Award Declaratory Relief.

Plaintiffs thus meet the standard for injunctive relief, but the Court may—and should—also award a declaratory judgment. *See* 28 U.S.C. § 2201(a) (declaratory judgment may issue "whether or not further relief is or could be sought"); Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate."). Plaintiffs have requested declaratory relief, *see* FAC ¶ 158; Mot. at 1, ECF No. 19, and a declaratory judgment here unquestionably "serve[s] a useful purpose in clarifying and settling the legal relations in issue," and "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (citation omitted). Defendants do not argue otherwise.

None of Defendants' arguments regarding the relief that Plaintiffs seek, Opp. 41-42, exempts the President from the scope of any declaratory relief that the Court may award. Rather, the Supreme Court has indicated that it is "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision" set out in a declaratory judgment. *Utah v. Evans*, 536 U.S. at 464 (quoting *Franklin*, 505 U.S. at 803 (plurality opinion)). This presumption of compliance articulated by the Supreme Court extends, on its face, to each and every Defendant, and Defendants do not suggest they would defy this presumption.

CONCLUSION

Plaintiffs' motion for partial summary judgment should be granted. Alternatively, the Court should preliminary enjoin Defendants from implementing the Memorandum.

Dated: September 15, 2020

Respectfully submitted,

/s/

Daniel T. Grant (Bar No. 19659)
Shankar Duraiswamy*
Carlton E. Forbes*
Jeffrey Cao*
Morgan E. Saunders*
Patricio G. Martínez-Llompart*
COVINGTON & BURLING LLP
One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
dgrant@cov.com
sduraiswamy@cov.com
cforbes@cov.com
jcao@cov.com
msaunders@cov.com
pmartinezllompart@cov.com

P. Benjamin Duke*
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
Tel: (212) 841-1000
Fax: (212) 841-1010
pbduke@cov.com

Morgan E. Lewis*
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105
Tel: (415) 591-6000
melewis@cov.com

Attorneys for Plaintiffs

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that on this 15th day of September, 2020, I caused a copy of the foregoing Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment or a Preliminary Injunction to be sent to all parties receiving CM/ECF notices in this case.

COVINGTON & BURLING LLP

By: /s/ Daniel Grant
Daniel Grant (Bar Number: 19659)

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001-4956
Tel: (202) 662-6000
Fax: (202) 662-6302