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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants, and DIANA MARTINEZ, et al., COUNTY OF SANTA CLARA, CALIFORNIA, et al., STATE OF NEW YORK, et al., Defendant-Intervenors.	Civil Action No. 2:18-cv-00772-RDP

MARTINEZ DEFENDANT-INTERVENORS' REPLY TO PLAINTIFFS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

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INTRODUCTION

Defendant-Intervenors Diana Martinez, *et al*. ("Martinez Intervenors") file this brief in response to the Response from Plaintiffs to the Court's January 8, 2021 Show Cause Order. *See* Doc. 204. Plaintiffs have not demonstrated that they have standing in their Response. President Joseph Biden's executive order concerning the Census and apportionment necessitates the convening of a three-judge panel to decide the merits of Plaintiffs' claims. Additionally, Martinez Intervenors respectfully request an opportunity for the parties to conduct discovery and brief jurisdiction and the merits of Plaintiffs' claims fully.

The Court ordered Plaintiffs State of Alabama and Representative Morris Brooks ("Plaintiffs") to show cause as to "why the injuries they allege are more than just 'predictions.'" *See* Doc. 195, Order to Show Cause, at 3 (internal citation omitted).

On January 20, 2021, President Joseph Biden issued his "Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census." The Court then ordered that in addition to briefing the issue raised in the show cause order, "parties SHALL also address the implications of the Executive Order, particularly as it relates to the question of whether a ruling on the propriety of the Census Bureau's Residence Rule would redress (*i. e.*, cure) the injury claimed by Plaintiffs." *See* Doc. 203 (emphasis in original). On February 4, 2021, Plaintiffs filed their response to the show cause order. *See* Doc. 204.

I. The President's January 20, 2021, Executive Order Necessitates A Three-Judge Panel To Decide The Merits Of Plaintiffs' Claims

In response to the Court's order that parties explain the effects that President Biden's Executive Order has on Plaintiffs' claims, Martinez Intervenors submit that the Executive Order

necessitates the convening of a three-judge panel under § 2284(a). *See* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body"). The President's stated intent and the nature of relief that Plaintiffs seek show that this case no longer has to do with a matter preliminary to apportionment, but constitutes a challenge to apportionment itself. The current Court may decide on its own whether it has jurisdiction over Plaintiffs' claims, but a three-judge panel would be required to decide the merits of Plaintiffs' claims.

A. The Relief that Plaintiffs now seek after President Biden's Executive Order deals directly with apportionment, not a preliminary matter.

1. The Court's prior denial of a three-judge panel.

The Court denied Plaintiffs' motion to convene a three-judge panel "because Plaintiffs do not challenge the apportionment of congressional districts." Doc. 178 at 5. The Court stated that "Plaintiffs' challenge to the Residence Rule is not a challenge to the actual division of congressional districts but rather a challenge to a practice that might affect a future division of districts." Doc. 178 at 5 (citing Doc. 112 at ¶ 128). The Court further explained that "Plaintiffs outline the functional distinction between the Residence Rule and apportionment in their Complaint by alleging that the 'Residence Rule *will cause the apportionment* based on the 2020 census to violate the Fourteenth Amendment.'" *Id*. at 5 (citing Doc. 112 at ¶ 128) (emphasis added by Court). In its order, the Court pointed to other courts that have drawn the distinction between challenging actual apportionment and challenging "precursors to the ultimate apportionment decision." *Id*. at 6.

2. President Biden's Executive Order shows that this is now an apportionment case.

Several months after the Court's order denying the motion for a three-judge panel, newly-inaugurated President Joseph Biden issued an executive order on January 20, 2021, titled "Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census" ("Biden Census Order"). *See* Defendants' Notice and attached Executive Order (Doc. 200; 200-1. President Biden's Census Order states that the Constitution and statute "require that the apportionment base of each State, for the purpose of the reapportionment of Representatives following the decennial census, include all persons whose usual place of residence was in that State as of the designated census date, regardless of their immigration status." Biden Census Order § 2. President Biden's Census Order abandons President Trump's Memorandum of July 21, 2020 ("Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census"), which "aimed to produce a different apportionment base—one that would, to the maximum extent feasible, exclude persons who are not in a lawful immigration status." Biden Census Order § 1. Furthermore, President Biden's Census Order states that "it is the policy of the United States that reapportionment shall be based on the total number of persons residing in the several States, without regard for immigration status." *Id*. § 2

The President's January 20, 2021 Census Order shows his intent to base apportionment on an enumeration of all residents, regardless of immigration status. The President's transmittal to Congress of a statement of apportionment based on all residents, as he defines them, would be an action that is directly a part of apportionment. *See* 2 U.S.C.A. § 2a(a) ("the President shall transmit to the Congress a statement showing the whole number of persons in each State, [as ascertained in the] decennial census […] and the number of Representatives to which each State would be entitled under an apportionment"). Even though the Secretary and Census Bureau

conduct the Census and promulgate and execute the Residence Rule, those actions only precede the "final responsibility" of the transmittal of the apportionment statement to Congress that is entrusted to the President as a constitutional officer. *See Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992) ("it is clear that Congress thought it was important to involve a constitutional officer in the apportionment process"); *see also* S.Rep. No. 2, 71st Cong., 1st Sess., at 5 ("the Secretary of Commerce should not be intrusted [sic] with the final responsibility for making so important a report to Congress"). As the Court stated in its order denying Plaintiffs' motion for a three-judge panel, Plaintiffs "do not challenge the apportionment of congressional seats but challenge the Census Bureau's practices." *See* Doc. 178 at 2. The Court further noted that "the provision that Plaintiffs contend is unlawful is the 'Residence Rule,'" and that Plaintiffs allege that the Residence Rule "will cause the apportionment based on the 2020 census to violate the Fourteenth Amendment." *See id.* at 2-3. Even if the Court were to grant Plaintiffs' requested relief and set aside the Residence Rule as unconstitutional, President Biden now says that he will base his statement of apportionment on "the total number of persons residing in the several States, without regard to immigration status." *See* Biden Census Order § 2.

3. Plaintiffs' Response to the Show Cause Order also shows that this case is now about apportionment.

Plaintiffs seek to force the President's hand on apportionment, and their claims therefore are no longer solely about the Residence Rule, which is a preliminary matter to apportionment. Plaintiffs state that "the Residence Rule and the Biden Executive Order require Defendants to include illegal aliens in the apportionment base, see Biden Executive Order § 2." Plfs.' Resp. at 9. However, Plaintiffs elide the fact that their requested relief does not challenge Biden's Census Order, only the Residence Rule.

Plaintiffs have not amended their complaint or otherwise moved to include relief regarding the President's Census Order or to add the President as a defendant. Rather, Plaintiffs claim that if the Court ordered the Secretary "to submit a report to the President that does not include [undocumented immigrants] in the census count," then that would accomplish their aims. *See* Plfs' Resp. at 10 (citing *Utah v. Evans*, 536 U.S. 452, 463 (2002)).

Plaintiffs' theory of how their requested relief would redress their alleged injury—the Secretary sending one set of data excluding undocumented immigrants in her report to the President—contradicts the only empirical evidence of how Defendants Secretary of Commerce and Census Bureau have indicated they would comply with an order to provide a report to the President enabling him to exclude undocumented immigrants from the apportionment base. That evidence comes from briefing by Federal Defendants the New York case, in which they clarified that they understood President Trump's July 21, 2020 Memorandum to direct the Secretary "to provide two sets of numbers—one tabulated 'according to the methodology set forth in' the Residence Criteria for counting everyone at their usual residence, and a second 'permitting the President, *to the extent practicable*,' to carry out the stated policy of excluding illegal aliens from the apportionment base." *See* Ex. A, Mem. of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction, *New York v. Trump*, No. 20-CV-5770-RCW-PWH-JMF (S.D.N.Y. Aug. 19, 2020), ECF No. 118 at 7; *see also* Ex. B, Brief of Appellants President Donald J. Trump, *et al.*, *Trump v. New York*, No. 20–366 (U.S. Oct. 2020) at 24-25 ("The President has directed the Secretary, in taking the decennial census and tabulating the population, to provide two sets of numbers: one that is 'tabulated according to the methodology set forth in' the Residence Criteria, and a second that consists of 'information permitting the President, to the extent practicable,' to carry out the

policy of excluding illegal aliens from the apportionment"). President Trump's Memorandum did not expressly require the Secretary to send a report with two sets of data, but that is how Federal Defendants stated that they would comply with such an order. *See* Trump Memorandum, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census," 85 FR 44679 (not mentioning two datasets). There is no evidence to believe that the Secretary would comply with an order by the Court that the Residence Rule is invalid by sending only one set of data to the President. Rather, the Secretary would comply with the Court's order by sending the President two sets of data—one tabulated according to the methodology set forth in the Residence Criteria and one with the information that would enable him to exclude undocumented immigrants from the apportionment.

Plaintiffs therefore assume without evidence that the President would use the dataset that would allow him to exclude undocumented immigrants from the apportionment for that very purpose, even though he has expressed his intent to include undocumented immigrants. Whether or not the President is required to be named as a defendant to prevent such an action and thereby redress Plaintiffs' alleged injuries, this case is now about apportionment and not a precursor to it or some preliminary matter.[1] Therefore, if the Court determines that it has jurisdiction over Plaintiffs' claims, a three-judge panel should be convened.

B. This Court may, and should, decide jurisdiction on its own.

This Court may determine whether it has jurisdiction over Plaintiffs' claims. In *Shapiro v. McManus*, the Supreme Court stated that "a three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (quoting *Gonzalez v. Automatic*

[1] Martinez Intervenors previously briefed the issue of Plaintiffs' failure to include the President of the United States as a defendant. *See* Doc. 60 at 6-7; *see also* Doc. 70 at 1-3.

Employees Credit Union, 419 U.S. 90 (1974)). Therefore, the Court may decide to dispose of Plaintiffs' claims based on lack of jurisdiction before convening a three-judge panel and moving onto a determination of this case on the merits. *See Igartua v. Obama*, 842 F.3d 149, 156 (1st Cir. 2016) (proposition that a single district judge must determine whether a request for three judges is required by § 2284(a) presumes subject-matter jurisdiction). Martinez Intervenors urge this Court to decide jurisdiction in this case after full briefing and to dismiss this case, as Plaintiffs have not and cannot show that their alleged harm is more than mere speculative prediction.

II. This Court should dismiss this case for lack of jurisdiction because Plaintiffs have failed to demonstrate that they have standing.

Plaintiffs have the burden of establishing that they have suffered or will imminently suffer an injury as a result of apportionment based on total population, including undocumented immigrants, and that their alleged harm is redressable by this court. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs have not demonstrated that they have standing in their Response to the Order to Show, Cause and Plaintiffs' claims should be dismissed for lack of standing after full briefing of jurisdictional issues in this case.

The Supreme Court's "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty*

Intern. USA, 568 U.S. 398, 409 (2013) (internal quotations omitted). Full briefing of the jurisdictional issues in this case will show that Plaintiffs cannot demonstrate that they are imminently at risk of losing a seventh congressional seat because undocumented immigrants are included in the apportionment count, and that Plaintiffs' claims are not redressable by this Court.

A. Plaintiffs have not met their burden of showing that Alabama's loss of a congressional seat is certainly impending.

At the summary judgment phase, plaintiffs' injury must be "certainly impending to constitute injury in fact, and . . . allegations of possible future injury are not sufficient." *Clapper*, 568 U.S. 398, 409 (2013) (internal quotations omitted). In some instances, injury may be found where there is a "substantial risk" of a future harm. *See Id.* at 414, n. 5. However, just as in *New York*, Plaintiffs' claim that Alabama's will lose its seventh congressional seat is simply too speculative at this point and is nothing more than a "prediction" that does not meet the high burden to establish standing at this stage. *See New York*, 141 S. Ct. at 535-37. While Alabama may have a relatively smaller share of the undocumented immigrant population when compared to other states, that fact alone does not support Alabama's claim that it has standing, or more specifically, that Alabama's alleged loss of a congressional seat is "certainly impending." *Clapper*, 568 U.S. at 409.

Different reasonable estimates produce different results with respect to Alabama's likelihood to lose its seventh congressional seat. Plaintiffs' expert, Dr. Dudley Poston, concludes that Alabama will lose a congressional seat. Doc. 204 at 7-8. Plaintiffs quote Intervenors' expert Kimball Brace for the proposition that "[t]he Alabama seat would shift to the state of New York," *id.*, but as Mr. Brace states in the very report cited by Plaintiffs, the estimates he used affect the outcome of his analysis specifically with respect to Alabama. Mr. Brace notes that, "Alabama's loss would change to no-change in their number of Congressional Districts if the

new Census estimates for July 1[, 2020,] were instead used," to estimate apportionment. Brace Rep., Ex. C, Add. 2 at 2. Intervenors' expert Dr. Sunshine Hillygus also confirms that if one assumes that the Census Bureau's July 2020 projections are more likely to accurately predict Census count for the states on Census Day, then Alabama will instead retain its seventh congressional seat. Hillygus Rep., Ex. D at 2-3. In addition, Mr. Brace cautions that, "the apportionment calculations are very susceptible to small changes in the data, particularly for the states that fall close to the 435-seat cut-off point." Brace Rep., Ex. C at ¶11.

Factors such as the effect of the overseas population on the apportionment count, the effect of the COVID-19 pandemic on the Census count, and natural disasters are among some of the variables that may affect the Census count, thus making any prediction of Alabama's risk of losing a congressional seat unreliable. For example, Dr. Poston's decision not to account for the military overseas population in his most recent report demonstrates one way in which his projections are unreliable. Hillygus Rep., Ex. D at 3-4; Brace Rep., Ex. C at ¶28. Dr. Hillygus explains in her declaration, that "if we replicate the approach Dr. Poston used to estimate the overseas population in his initial report . . . , adding these estimates to his April 2020 population estimates, the method of equal proportions projects that Alabama would retain seven congressional seats." Hillygus Rep., Ex. D at 4. Given Alabama's priority ranking in the apportionment process, the size of the enumerated military overseas population included in the apportionment count could have a determinative effect on Alabama's seat allocation. Dr. Poston's failure to address this issue in his most recent report underscores the susceptibility of his conclusion to factors independent of whether or not undocumented immigrants are included in the apportionment count.

Additionally, the ongoing pandemic makes population estimates and predictions on the effect on apportionment particularly difficult. *See* Hillygus Rep., Ex. D, at 3. For example, data indicates that people moved less in 2020, and when they did move, they moved out of states like New York, with which Alabama is competing for the 435th and last House seat. Hillygus Rep., Ex. D at 3. Given the placement of New York and Alabama relative to each other in the various apportionment studies presented to this court, this factor contributes to the unreliability of Plaintiffs' evidence that Alabama will lose a congressional seat.

The pandemic also resulted in many college and university students returning home prior to or around the time of the Census date, April 1, when schools shut down. For states with higher percentages of student populations that lived out of state may have lost population during the 2020 Census. For a state like New York, with a large student population, to the extent that its students did not stay in New York and were instead counted in states other than New York, it is likely to lose population relative to other states with smaller student populations. Hillygus Rep., Ex. D at 3. Alabama's placement in the priority rankings for apportionment is so close to the margin, that the movement of students in Alabama and in other states as a result of school shutdowns highlights how difficult it is to predict whether Alabama is at substantial risk of losing a congressional seat. *See* Brace Rep., Ex. C at ¶28.

These examples demonstrate that Poston's calculations do not support the conclusion that Alabama is substantially likely to lose a congressional seat, and thus Plaintiffs have not met their burden to show at this stage of the litigation.[2] Martinez Intervenors urge the Court to dismiss this case for a lack of jurisdiction after full briefing on these issues.

[2] Contributing to the speculative nature of Alabama's threatened injury are other policy decisions that could be made that could alleviate Plaintiffs' harm. One would be if Congress acted to change the number of seats in the House of Representatives, thereby expanding the number of

B. Plaintiffs Failed to Establish That Their Alleged Injury Is Caused by the Inclusion of Undocumented Immigrants in the Apportionment Count

"Even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable," to the inclusion of undocumented immigrants in the apportionment count. *Clapper*, at 401-02; *see also Lujan*, 504 U.S. at 559 ("[T]here must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.") (internal quotations and citations omitted). Even if Plaintiffs are substantially likely to lose a congressional seat, they have not have not presented evidence that demonstrates that the inclusion of the undocumented immigrant population in the apportionment count is the cause of that loss.

Dr. Poston performs his analysis using estimates of the undocumented immigrant population that are unreliable, and thus his calculations do not support the argument that apportionment based on total population is the cause of Alabama's alleged loss of a congressional seat. Poston's reliance on Center for Migration Statistics data in his current report, and Pew Research Center data in his originally disclosed report, is unreliable because both studies use a methodology known as the residual method. The residual method estimates are "subject to significant sampling and nonsampling errors, which render any resulting projections too imprecise and unreliable for purposes of apportionment." Hillygus Rep., Ex. D at 5. While these estimates may be the "best estimates" available for academic or other purposes, they are

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seats available. *See* 2 U.S.C. 2a. Another would be if Congress changed the method of apportioning House of Representative seats to some other method, as Congress chose to do in 1940, when it ended the use of the method of major fractions, in favor of the method of equal proportions. *See* Brace Rep., Ex. C at ¶¶ 20-23.

not "reasonably accurate" for the purpose of apportionment and do not constitute fair traceability.

Plaintiffs have provided no evidence to demonstrate that Defendants could enumerate the undocumented immigrant population. Dr. Poston's exercise attempts to account for the inevitability that Defendants will be unable to enumerate some significant portion of the undocumented immigrant population, by performing his calculations under a scenario where only 10% of the population is excluded from state totals. However, as Dr. Hillygus explains, the likelihood that the Census Bureau would be able to use administrative records to enumerate a sufficient number of undocumented immigrants that could be matched to Census records such that it would be significant enough to make it matter is not plausible. Hillygus Rep., Ex. D, at 5 ("[I]t is implausible that the percentages of undocumented immigrants who can be identified in administrative records will be equally proportional to the CMS estimates across all 50 states, and such variation could impact the number of seats Alabama is allocated given the zero-sum apportionment formula.").

Indeed, this is one of the issues the Supreme Court grappled with in *New York*, when it ultimately decided that plaintiffs in that case lacked standing given the uncertainty surrounding whether the Census Bureau could enumerate the undocumented immigrant population and how many individuals would be identified in administrative records. *See Trump v. New York*, *Trump v. New York*, 141 S. Ct. 530, 536 (2020) ("[n]othing in the record addresses the consequences of a partial implementation of the memorandum, much less supports the dissent's speculation that excluding aliens in ICE detention will impact interstate apportionment"). Assuming *arguendo* that Alabama is substantially likely to lose a congressional seat, which as explained above Plaintiffs have failed to demonstrate, Plaintiffs have also failed to establish that the alleged harm

is caused by the inclusion of undocumented immigrants in the apportionment count, and not the result of some other independent factor, such as poor response to the Census. Martinez Intervenors urge the Court to dismiss this case for a lack of jurisdiction now, or after full briefing on these issues.

C. Plaintiffs' Alleged Injury is Not Redressable or Remediable by This Court.

Plaintiffs' claims are also not redressable by the Court, given that the Census field operations have concluded and that Plaintiffs have presented no evidence to demonstrate that Federal Defendants could otherwise enumerate the undocumented immigrant population in the U.S. by state. "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 4216 U.S 26,38 43 (1976).

Federal Defendants cannot produce a reliable enumeration of the undocumented immigrant population. A question on immigration status was not included on the 2020 Census questionnaire. Thus, the only source for immigration data, as opposed to impermissible estimation, is in administrative records. However, very few records exist that provide data about an individual's undocumented immigrant status. *See* Hillygus Rep., Ex. D, at 5. The Supreme Court noted in *New York* that "the record is silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner." *New York*, 141 S.Ct. at 537.

One possible source of records that have been raised in the *New York* litigation and other cases related to President Trump's Presidential Memorandum is Immigration and Customs Enforcement detention records. However, these records represent only a small fraction of

undocumented immigrants. *See* Hillygus Rep., Ex. D, at 6-7. Even then, these records are not necessarily fit for use for the purposes of enumeration. Not all detained individuals are undocumented, ICE and Department of Homeland Security records may have inaccuracies, and it is difficult to ascertain a person's undocumented immigrant status. Hillygus Rep., Ex. D at 7-8. The Department of Homeland Security itself recognizes how difficult it is to ascertain an individual's immigration status, stating, "Immigration status and data are notoriously difficult to combine due to its dynamic nature – individuals can have multiple immigration statuses through their lifetime."[3] In this circumstance, the task is harder still, as the Census Bureau would be required to try and determine an individual's status on one day, April 1, 2020. Here, Plaintiffs have presented no evidence that it would be possible to enumerate the undocumented immigrant population by state, even to a partial extent, or that the data that exists for a small fraction of undocumented immigrants is reliable and fit for use for in apportionment, which must be an "actual enumeration" under the Constitution. Thus, Plaintiffs have failed to establish that this Court could issue a remedy that could redress Plaintiffs' speculative injury. Martinez Intervenors urge the Court to dismiss this case for a lack of jurisdiction now, or after full briefing on these issues.[4]

III. Discovery And Full Briefing Should Precede A Decision On Jurisdiction And The Merits Of Plaintiffs' Claims.

A. Additional Discovery Is Necessary.

[3] Privacy Impact Assessment for the DHS Immigration-Related Information Sharing with U.S. Census Bureau, DHS Reference No. DHS/ALL/PIA-079, U.S. DEPARTMENT OF HOMELAND SECURITY at p. 15 (*updated* Nov. 23. 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-november2020.pdf.

[4] Martinez Intervenors further contend that identifying and subtracting a fractional portion of the undocumented population – particularly if that fraction skews to specific states, as the detainee population would – is unconstitutional. The count of only a fraction of a population is, by definition, not an actual enumeration, as required by the Constitution.

Discovery is necessary to enable the Court to decide Plaintiffs' claims, both as to jurisdiction and the merits. Without knowing whether the Census Bureau can produce the data that Plaintiffs seek, the Court cannot determine whether it can redress Plaintiffs' injuries. The Census Bureau, for example, may be unable to match administrative records data to Census data.

Additionally, there may be other statutory problems with the administrative records data that Plaintiffs hope can be used to exclude people from the apportionment base, such as their potential unreliability and inaccuracy. The Supreme Court noted that the record in *Trump v. New York* was "silent on which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data in a timely manner." *Trump v. New York*, 141 S. Ct. at 535. Martinez Intervenors are not aware of information from Defendants that would indicate that this has changed.

Indeed, in abandoning the policy of former President Donald J. Trump by revoking his Presidential Memorandum of July 21, 2020 (Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census), President Biden's Census Order notes that President Trump's Presidential Memorandum "required the Census Bureau to inappropriately rely on records related to immigration status that were likely to be incomplete and inaccurate." Biden Census Order § 1. The President's January 20, 2021 Order further states that it is "essential that the census count be accurate and based on reliable and high-quality data." *Id.* Even if the Census Bureau can produce some of the data required for Plaintiffs' requested relief, the degree to which Defendants can and the manner in which they do go to the question of whether Plaintiffs' requested relief would result in an "actual enumeration" that is required by the Constitution.

Finally, Defendants and Defendant-Intervenors have not been able to examine Plaintiffs' expert Dudley L. Poston about his newly disclosed opinions. *See* Doc. 204-1, Sworn Declaration and Second Supplemental Expert Report of Dudley L. Poston, JR, Ph.D. Plaintiffs disclosed these new opinions on February 4, 2021, for the first time and did not provide Martinez Intervenors with any notice that such a disclosure was forthcoming.

Under Rule 26(e), a party may and has a "duty to supplement [that] extends both to information included in the report and to information given during the expert's deposition. *See* Fed. R. Civ. P. 26(e)(2). That rule also considers a disclosure timely by the timetable given in the rule for initial and supplemental disclosures, which says "at least 30 days before trial." *See id*; *see also* Fed. R. Civ. P. 26(a)(3). Whether or not Plaintiffs' disclosure was timely, "a party cannot abuse Rule 26(e) to merely bolster a defective or problematic expert witness report." *See Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 719 (11th Cir. 2019) (internal citation omitted). It would be unfair to Martinez Intervenors for the Court to consider Plaintiffs' expert disclosure without considering other supplemental disclosures and allowing Martinez Intervenors to conduct discovery with regard to Dr. Poston's opinions.

Martinez Intervenors respectfully request a schedule for additional discovery if the Court decides that the case should proceed.

B. Martinez Intervenors Request An Opportunity To Provide Full Briefing On Jurisdiction And The Merits.

The Court's stay halted filing of dispositive motions on jurisdiction and merits upon the parties' requests, pending the Supreme Court's decision in *Trump v. New York*, 141 S. Ct. 530 (2020). The Court later extended this stay on January 8, 2021. *See* Doc. 195.

The Court's Show Cause Order only ordered Plaintiffs to "**SHOW CAUSE** why the injuries they allege are more than just 'predictions.'" Doc. 195 (Order Extending Stay) at 3

(emphasis in original). Plaintiffs have not shown that they have standing to bring their claims or that the injuries they allege are more than just predictions. Therefore, the Court may dismiss Plaintiffs' claims now for lack of jurisdiction. However, if the Court decides that this case may proceed, there are other issues that Martinez Intervenors wish to raise in addition to those raised in this brief. Additionally, the recent transition to a new administration under President Biden means that Defendants are more likely to mount a true defense of the Residence Rule against Plaintiffs' claims, particularly given President Biden's Census Order. The change in administration therefore merits an opportunity for Defendants to present full evidence and briefing on jurisdiction and the merits if Plaintiffs' claims proceed.

As explained in this response, and as Plaintiffs admit in their own response to the show cause order, the record is insufficient to decide jurisdiction and the merits in favor of Plaintiffs. *See* Plfs.' Resp. (Doc. 204) at 11. Therefore, Martinez Intervenors respectfully request that the Court dismiss Plaintiffs' claims for lack of jurisdiction. If the Court decides that Plaintiffs' claims may proceed, Martinez Intervenors respectfully request that the Court allow for a new schedule for dispositive motions and briefing on jurisdiction and merits before deciding those issues.

February 17, 2021

Respectfully submitted,

/s/ Andrea Senteno

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Andrea Senteno
Andrea Senteno