U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

October 29, 2020

Patrick Carome
c/o Jared Gurbow
WilmerHale
1875 Pennsylvania Avenue NW
Washington, DC 20006
jared.grubow@wilmerhale.com

Re: FOIA-2020-01688
20-cv-02674 (D.D.C.)
VRB:BPF

Dear Patrick Carome:

This is an interim response to your aggregated FOIA requests dated July 1, 2020 and received in this Office on July 13, 2020, in which you requested records of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), and Legal Policy (OLP) pertaining to the 2020 Census and use of citizenship status data collected pursuant to Executive Order 13880, dating from June 27, 2019.

Please be advised that searches have been conducted within the electronic database of the Departmental Executive Secretariat, which is the official records repository of OAG, ODAG, and OASG, and twenty pages containing records responsive to your request were located. I have determined that these twenty pages are appropriate for release without withholdings, and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Stephen Elliott of the Department's Civil Division, Federal Programs Branch, at 202-353-0889.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

United States Senate

WASHINGTON, DC 20510

July 23, 2019

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Secretary Ross and Attorney General Barr:

The executive order directing federal agencies to compile citizenship data through administrative records and merge it with decennial census data is a blatant effort to collect this information for political and discriminatory purposes.[1] We write in strong opposition to this attempt to inappropriately mix this administration's harmful immigration policies with the ordinarily nonpartisan decennial census and nonpartisan work of federal statistical agencies generally. Furthermore, we will work to prohibit the Department of Commerce, or any other agency, from using federal funds to carry out this action.

Litigation surrounding the administration's efforts to add a citizenship question to the 2020 Census form, as well as documents from a partisan operative recently disclosed as part of that litigation, revealed that the proposal to collect citizenship information was designed both to depress the 2020 Census count and to be "advantageous to Republicans and Non-Hispanic Whites" and "clearly be a disadvantage to the Democrats" in gerrymandering efforts.[2] Furthermore, in his remarks on the proposed citizenship question, Attorney General Barr raised the possibility that these data could be used to change the population base used for congressional apportionment—a purpose, we should note, that would blatantly violate the U.S. Constitution's apportionment clause.[3]

In addition, the president justified his executive order by citing the use of citizenship data for immigration and other public policy purposes, stating, for example, that "data on the number of citizens and aliens in the country is needed to help us understand the effects of immigration on our country and to inform policymakers considering basic decisions about immigration policy," and that "[t]he Federal Government's need for a more accurate count of illegal aliens in the country is only made more acute by the recent massive influx of illegal immigrants at our southern border."

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[1] "Executive Order on Collecting Information about Citizenship Status in Connection with the Decennial Census," 11 July 2019, https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/.

[2] Michael Wines, "Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question," The New York Times, 30 May 2019, https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html.

[3] "Remarks by Attorney General William P. Barr on Census Citizenship Question," 11 July 2019, https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-census-citizenship-question. Specifically, Attorney General Barr stated: "For example, there is a current dispute over whether illegal aliens can be included for apportionment purposes. Depending on the resolution of that dispute, this data may possibly prove relevant."

The president's executive order bypasses the successful legal challenges to the citizenship question and forces this information into 2020 Census data using methods that have not been reviewed for accuracy, legality, and feasibility. This is an unlawful overreach of executive authority. The failed attempt to add a citizenship question clearly illustrated the true intent of this administration to assist discriminatory redistricting, apportionment, and public policy decisions that harm communities of color, and particularly immigrant populations.

The president's attempt to sustain the controversy over citizenship data in the decennial census—which is the basis for allocating federal funding and congressional and legislative districts—makes clear that his purpose is not a robust 2020 Census, but rather a partisan and discriminatory attack on people living in our country. Our government must never use decennial census data to otherize, separate, or disenfranchise people living in our country.

Sincerely,

BRIAN SCHATZ
United States Senator

RICHARD J. DURBIN
United States Senator

PATTY MURRAY
United States Senator

DIANNE FEINSTEIN
United States Senator

JACK REED
United States Senator

SHERROD BROWN
United States Senator

KIRSTEN GILLIBRAND
United States Senator

SHELDON WHITEHOUSE
United States Senator

ELIZABETH WARREN
United States Senator

TIM KAINE
United States Senator

ROBERT P. CASEY, JR.
United States Senator

CORY A. BOOKER
United States Senator

TAMMY DUCKWORTH
United States Senator

AMY KLOBUCHAR
United States Senator

MAZIE K. HIRONO
United States Senator

MICHAEL F. BENNET
United States Senator

CHARLES E. SCHUMER
United States Senator

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 2 9 2019

The Honorable Brian Schatz
United States Senate
Washington, DC 20510

Dear Senator Schatz:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 2 9 2019

The Honorable Patty Murray
United States Senate
Washington, DC 20510

Dear Senator Murray:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Jack Reed
United States Senate
Washington, DC 20510

Dear Senator Reed:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Kirsten Gillibrand
United States Senate
Washington, DC 20510

Dear Senator Gillibrand:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Elizabeth Warren
United States Senate
Washington, DC 20510

Dear Senator Warren:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

Dear Senator Durbin:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Dianne Feinstein
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Sherrod Brown
United States Senate
Washington, DC 20510

Dear Senator Brown:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Tim Kaine
United States Senate
Washington, DC 20510

Dear Senator Kaine:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Robert P. Casey, Jr.
United States Senate
Washington, DC 20510

Dear Senator Casey:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Tammy Duckworth
United States Senate
Washington, DC 20510

Dear Senator Duckworth:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 2 9 2019

The Honorable Mazie K. Hirono
United States Senate
Washington, DC 20510

Dear Senator Hirono:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Charles E. Schumer
United States Senate
Washington, DC 20510

Dear Senator Schumer:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 29 2019

The Honorable Cory A. Booker
United States Senate
Washington, DC 20510

Dear Senator Booker:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 2 9 2019

The Honorable Amy Klobuchar
United States Senate
Washington, DC 20510

Dear Senator Klobuchar:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

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Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 2 9 2019

The Honorable Michael F. Bennet
United States Senate
Washington, DC 20510

Dear Senator Bennet:

This responds to your letter to the Attorney General dated July 23, 2019, regarding the President's efforts to include a citizenship question on the decennial census. We are sending identical responses to the other Senators who joined your letter.

After the Supreme Court's decision in *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), and after examining all possible alternatives, the Attorney General and the Secretary of Commerce determined that the "logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the [citizenship] question on the 2020 decennial census." *See* Exec. Order No. 13880, 84 F.R. 136 at 33821-33825 (2019). As the President's July 11, 2019 Executive Order therefore makes clear, no citizenship question will appear on the 2020 Census.

We hope this information is helpful. Please do not hesitate to contact this office if we may further assist you in this or any other matter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

November 30, 2020

Patrick Carome
c/o Jared Gurbow
WilmerHale
1875 Pennsylvania Avenue NW
Washington, DC 20006
jared.grubow@wilmerhale.com

Re: FOIA-2020-01688
20-cv-02674 (D.D.C.)
VRB:BPF

Dear Patrick Carome:

This is a final response to your aggregated FOIA requests dated July 1, 2020 and received in this Office on July 13, 2020, in which you requested records of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), and Legal Policy (OLP) pertaining to the 2020 Census and use of citizenship status data collected pursuant to Executive Order 13880, dating from June 27, 2019.

On October 20, 2020, this Office provided you with an interim response to your request and advised you that searches of the Departmental Executive Secretariat had been completed. Please be advised that OIP's remaining searches have now been conducted within OAG, ODAG, OASG, and OLP, and 581 pages containing records responsive to your request were located.

Because seven of these pages originated with the Office of Legal Counsel (OLC), we have referred this material to OLC. It is our understanding that this material is duplicative of material already located by OLC and that OLC has already issued a response to you as to this material. Additionally, I have determined that 283 pages are appropriate for release with some information withheld pursuant to Exemptions 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(5) and (b)(6), and copies are enclosed. Finally, 291 pages are being withheld in full pursuant to Exemptions 5 and 6 of the FOIA. Exemption 5 pertains to certain inter- and intra-agency communications protected by the attorney work-product, deliberative process, and/or presidential communications privileges. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy.

Please be advised that a portion of the materials withheld in full consists of draft responses to Questions for the Records submitted by Congress to the Census Bureau. The submitted questions may be located here: https://docs.house.gov/meetings/GO/GO02/20190724/109848/HHRG-116-GO02-20190724-QFR005.pdf.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Stephen Elliott of the Department's Civil Division, Federal Programs Branch, at 202-353-0889.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

Federal Register
Vol. 85, No. 142
Thursday, July 23, 2020

Presidential Documents

Title 3—

The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the ''whole number of persons in each State,'' which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is ''the President's personal transmittal of the report to Congress'' that ''settles the apportionment'' of Representatives among the States, and the President's discretion to settle the apportionment is more than ''ceremonial or ministerial'' and is essential ''to the integrity of the process'' (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the ''persons in each State, excluding Indians not taxed,'' to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term ''persons in each State'' has been interpreted to mean that only the ''inhabitants'' of each State should be included. Determining which persons should be considered ''inhabitants'' for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are ''persons'' who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically ''in'' a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an ''inhabitant'' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. 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.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

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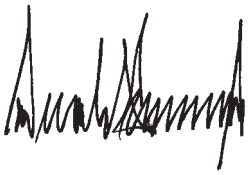
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
Washington, July 21, 2020

[FR Doc. 2020–16216
Filed 7–22–20; 2:00 pm]
Billing code 3510–07–P

White House Press Office

From: White House Press Office
Sent: Tuesday, July 21, 2020 1:31 PM
To: (b)(6) DAG Jeffrey Rosen
Subject: Statement from the President Regarding Apportionment

The White

Office of the Press Secretary

FOR IMMEDIATE RELEASE
July 21, 2020

Statement from the President Regarding Apportionment

Last summer in the Rose Garden, I told the American people that I would not back down in my effort to determine the citizenship status of the United States population. Today, I am following through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census.

There used to be a time when you could proudly declare, "I am a citizen of the United States." But now, the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country. This is all part of a broader left-wing effort to erode the rights of Americans citizens, and I will not stand for it.

Today's action to exclude illegal aliens from the apportionment base reflects a better understanding of the Constitution and is consistent with the principles of our representative democracy. My Administration will not support giving congressional representation to aliens who enter or remain in the country unlawfully, because doing so would create perverse incentives and undermine our system of government. Just as we do not give political power to people who are here temporarily, we should not give political power to people who should not be here at all.

Under an Executive Order I signed last year, Federal departments and agencies have been collecting the information needed to conduct an accurate census and inform responsible decisions about public policy, voting rights, and representation in Congress. Today's action further advances this effort and is another example of my Administration's commitment to faithfully representing the citizens of the United States and putting their interests first.

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Unsubscribe

The White House · 1600 Pennsylvania Ave NW · Washington, DC 20500-0003 · USA · 202-456-1111

White House Press Office

From: White House Press Office
Sent: Tuesday, July 21, 2020 1:15 PM
To: (b)(6) DAG Jeffrey Rosen
Subject: Print pool report #3 - Oval office signing and lunch lid until 2:15 p.m.

From: Susan Crabtree <scrabtree@realclearpolitics.com>
Sent: Tuesday, July 21, 2020 1:12 PM
Subject: Print pool report #3 - Oval office signing and lunch lid until 2:15 p.m.

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The White House also separately sent out the details about the memorandum President Trump signed at 12:15 p.m. excluding illegal immigrants from the apportionment base following the 2020 census.

I've included the information, below.

The White House

Office of the Press Secretary
FOR IMMEDIATE RELEASE
July 21, 2020
July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

By the authority vested in me as President by the Constitution and the laws of the United States

of America, it is hereby ordered as follows:

Section 1. Background. In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the "whole number of persons in each State," which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States, and the President's discretion to settle the apportionment is more than "ceremonial or ministerial" and is essential "to the integrity of the process" (*Franklin* v. *Massachusetts*, 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the "persons in each State, excluding Indians not taxed," to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term "persons in each State" has been interpreted to mean that only the "inhabitants" of each State should be included. Determining which persons should be considered "inhabitants" for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are "persons" who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically "in" a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an "inhabitant" includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

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Sec. 2. Policy. For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. 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.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. Excluding Illegal Aliens from the Apportionment Base. In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (Feb. 8, 2018).

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(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

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DONALD J. TRUMP

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The White House

Office of the Press Secretary
FOR IMMEDIATE RELEASE
July 21, 2020
July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

By the authority vested in me as President by the Constitution and the laws of the United States

of America, it is hereby ordered as follows:

Section 1. Background. In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the "whole number of persons in each State," which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States, and the President's discretion to settle the apportionment is more than "ceremonial or ministerial" and is essential "to the integrity of the process" (*Franklin* v. *Massachusetts*, 505 U.S. 788, 799, and 800 (1992)).

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Sec. 2. Policy. For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. 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.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. Excluding Illegal Aliens from the Apportionment Base. In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (Feb. 8, 2018).

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

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DONALD J. TRUMP

White House Press Office

From: White House Press Office
Sent: Tuesday, July 21, 2020 1:04 PM
To: (b)(6) DAG Jeffrey Rosen
Subject: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

The White

Office of the Press Secretary

FOR IMMEDIATE RELEASE
July 21, 2020

July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

SUBJECT: Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Background. In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his

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Sec. 2. Policy. For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. 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.

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DONALD J. TRUMP

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White House Press Office

From: White House Press Office
Sent: Tuesday, July 21, 2020 1:04 PM
To: patrick.hovakimian4@usdoj.gov
Subject: Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

The White

Office of the Press Secretary

FOR IMMEDIATE RELEASE
July 21, 2020

July 21, 2020

MEMORANDUM FOR THE SECRETARY OF COMMERCE

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Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. Policy. For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. 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.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the

extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. Excluding Illegal Aliens from the Apportionment Base. In preparing his report to the President under section 141 (b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525 (Feb. 8, 2018).

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

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Levi, William (OAG)

From:	Levi, William (OAG)
Sent:	Monday, July 20, 2020 7:43 PM
To:	Moran, John (OAG); Engel, Steven A. (OLC); Hamilton, Gene (OAG)
Subject:	FW: For Review: Draft POTUS remarks re: apportionment
Attachments:	Census Remarks (001).docx

(b)(5), (b)(6)

[redacted]

Levi, William (OAG)

From: Levi, William (OAG)
Sent: Friday, July 17, 2020 11:23 AM
To: Engel, Steven A. (OLC)
Subject: FW: For Close-Hold Review: Statement on Apportionment PM
Attachments: Apportionment Statement (003).docx

(b)(5), (b)(6)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,	:	
Plaintiffs,	:	20-CV-5770 (RCW) (PWH) (JMF)
-v-	:	OPINION AND ORDER
DONALD J. TRUMP, *in his official capacity as President of the United States*, et al.,	:	
Defendants.	:	

Before: RICHARD C. WESLEY, United States Circuit Judge
PETER W. HALL, United States Circuit Judge
JESSE M. FURMAN, United States District Judge

PER CURIAM.

The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To enable that apportionment, it mandates that an "actual Enumeration" be conducted "every . . . ten Years, in such Manner as [Congress] shall by Law direct," an effort commonly known as the decennial census. *Id.* art. I, § 2, cl. 3. Congress has delegated the task of conducting the census to the Secretary of Commerce, who is required to

report "[t]he tabulation of total population by States" to the President. 13 U.S.C. § 141(a)-(b). The President, in turn, is required to transmit to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled" using a mathematical formula "known as the method of equal proportions." 2 U.S.C. § 2a(a). Throughout the Nation's history, the figures used to determine the apportionment of Congress — in the language of the current statutes, the "total population" and the "whole number of persons" in each State — have included every person residing in the United States at the time of the census, whether citizen or non-citizen and whether living here with legal status or without.

On July 21, 2020, however, the President announced that this long-standing practice will no longer be the case. In a Presidential Memorandum issued on that date (and entered into the Federal Register two days later), the President declared that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census" — which, as of today, is still ongoing — "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (ECF No. 1-1) (the "Presidential Memorandum").[1] To implement this new policy, the President ordered the Secretary of Commerce (the "Secretary") to provide him two sets of numbers for each State: first, the total population as determined in the 2020 census and, second, the total population as determined in the 2020 census minus the number of "aliens who are not in a lawful immigration status." *Id.* The President left it to the Secretary of Commerce to figure out how to calculate the number of "aliens who are not in a lawful immigration status" in each State. But one thing is

[1] Unless otherwise noted, all docket references are to 20-CV-5770.

clear: that number would not come from the census itself, as the 2020 census is not collecting information regarding citizenship status, let alone legal immigration status in this country, and the 2020 census will count illegal aliens according to where they reside.

In these consolidated cases, filed only three days after the Presidential Memorandum, two sets of Plaintiffs — one, a coalition of twenty-two States and the District of Columbia, fifteen cities and counties, and the United States Conference of Mayors (the "Governmental Plaintiffs") and the other, a coalition of non-governmental organizations (the "NGO Plaintiffs") — challenge the decision to exclude illegal aliens from the apportionment base for Congress on the ground that it violates the Constitution, statutes governing the census and apportionment, and other laws. On August 7, 2020, they filed a motion for summary judgment or, in the alternative, a preliminary injunction. Plaintiffs allege that the Presidential Memorandum will cause, or is already causing, two forms of irreparable harm. First, noting that the Presidential Memorandum itself identifies a State — believed to be California — that would stand to lose two or three seats in the House of Representatives if illegal aliens are excluded from the apportionment base, they argue that the Memorandum will result in the loss of seats in the House. Second, they argue that the Presidential Memorandum is having an immediate impact on the census count — which is still ongoing — and that that, in turn, is resulting, and will result, in various forms of injury. Defendants — the President, Secretary of Commerce Wilber L. Ross, Jr., Director of the U.S. Census Bureau Steven Dillingham (the "Director"), the United States Department of Commerce (the "Department"), and the Bureau of the Census (the "Census Bureau") — oppose Plaintiffs' motion and filed a cross-motion to dismiss, arguing that the Court lacks jurisdiction to entertain Plaintiffs' claims and that the exclusion of illegal aliens from the apportionment base is a lawful

exercise of the President's discretion with respect to the conduct of the census and apportionment.

For the reasons that follow, Plaintiffs are entitled to summary judgment. The Presidential Memorandum violates the statutes governing the census and apportionment in two clear respects. First, pursuant to the virtually automatic scheme established by these interlocking statutes, the Secretary is mandated to report a single set of numbers — "[t]he tabulation of total population by States" under the decennial census — to the President, and the President, in turn, is required to use the same set of numbers in connection with apportionment. By directing the Secretary to provide two sets of numbers, one derived from the decennial census and one not, and announcing that it is the policy of the United States to use the latter in connection with apportionment, the Presidential Memorandum deviates from, and thus violates, the statutory scheme. Second, the Presidential Memorandum violates the statute governing apportionment because, so long as they reside in the United States, illegal aliens qualify as "persons in" a "State" as Congress used those words.

On those bases, we declare the Presidential Memorandum to be an unlawful exercise of the authority granted to the President by statute and enjoin Defendants — but not the President himself — from including in the Secretary's report to the President any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Because the President exceeded the authority granted to him by Congress by statute, we need not, and do not, reach the overlapping, albeit distinct, question of whether the Presidential Memorandum constitutes a violation of the Constitution itself.

The merits of the parties' dispute are not particularly close or complicated. Before getting to the merits, however, we must confront a question that is closer: whether we have jurisdiction to even consider the merits.

It is axiomatic that federal courts are courts of limited jurisdiction and may consider the merits of a case only if the case is of the sort traditionally amenable to, and resolvable by, the judicial process. That requires a plaintiff seeking relief in federal court to demonstrate that it has "standing" to bring suit and that its claims are ripe for decision. Here, if the sole harm that Plaintiffs alleged were the harm to their apportionment interests, they might not satisfy the requirements of standing and ripeness, as the Secretary has not yet taken any public action in response to the Presidential Memorandum and could conceivably conclude that it is not feasible (or lawful) to exclude illegal aliens from the apportionment base. But Plaintiffs allege — and have proved — that they are suffering, and will suffer, more immediate and certain injuries by virtue of the harm that the Presidential Memorandum is causing to the accuracy of the census count itself. In light of those injuries, we conclude that we have jurisdiction to grant Plaintiffs the relief they are seeking.

BACKGROUND

The following background facts, drawn from the admissible materials submitted by the parties and materials of which the Court may take judicial notice, are undisputed except where noted. *See, e.g.*, *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).[2]

A. The Constitutional and Statutory Scheme

Article I of the Constitution requires that an "actual Enumeration" of the population, known as the decennial census, be conducted "every . . . ten Years, in such Manner as [Congress]

[2] We discuss facts relevant to the issues of standing and ripeness below.

shall by Law direct." U.S. Const. art I, § 2, cl. 3. The primary purpose of this enumeration was to apportion congressional representatives among the States "according to their respective Numbers." *Id.* The number of Representatives apportioned to each State determines, in turn, that State's share of electors in the Electoral College. *See id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3. For the first eighty years of the Nation's history, the States' "respective Numbers" were calculated according to the formula set forth in the Constitution's infamous "Three-Fifths Clause," which provided that the "actual Enumeration" established by the census would be arrived at by "adding to the whole Number of free Persons . . . , and excluding Indians not taxed, three fifths of all other Persons" — "all other Persons" being people then held as slaves. U.S. Const. art I, § 2, cl. 3. In 1868, that provision was modified by the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, *counting the whole number of persons in each State*, excluding Indians not taxed." U.S. Const. amend. XIV, § 2 (emphasis added).[3]

The modern census is governed by the Census Act, which Congress most recently amended in 1976. *See* Act. of Oct. 17, 1976 (the "Census Act" or the "Act"), Pub. L. No. 94-521, 90 Stat. 2459 (codified in scattered sections of 13 U.S.C.). Section 141(a) of the Act broadly delegates to the Secretary the duty to "take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Act then mandates that "[t]he tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date" — in this

[3] For practical purposes, the "Indians not taxed" proviso was rendered moot by the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)), which declared that all Native Americans born in the United States are citizens.

case, January 1, 2021 — "and reported by the Secretary to the President of the United States." *Id.* § 141(b). Within a short time thereafter — in this case, between January 3 and January 10, 2021 — "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." 2 U.S.C. § 2a(a). The Clerk of the House of Representatives must, in turn, "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" within fifteen days of the President's statement. *Id.* § 2a(b). With limited exceptions not relevant here, the Census Act strictly prohibits disclosure — even to other federal agencies — of any data or information concerning individual respondents to the census. *See* 13 U.S.C. §§ 8-9; *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 523 (S.D.N.Y.), *aff'd*, 139 S. Ct. 2551 (2019).

B. The Use of Census Data

Although the "initial" — and core — "constitutional purpose" of the census was to "provide a basis for apportioning representatives among the states in the Congress" (and, in turn, allocating members of the Electoral College), the census has long "fulfill[ed] many important and valuable functions for the benefit of the country." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). As the Supreme Court has observed, it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (internal quotation marks and citation omitted). Indeed, "[t]oday, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit

organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 519 (citation omitted). Among other things, the data are now used not only for apportionment, but also "for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

In *New York v. Department of Commerce*, the court described many of the varied uses beyond congressional apportionment to which the federal, state, and local governments put census data, which Plaintiffs reiterate in this case. *See* 351 F. Supp. 3d at 596-99, 610-13. To provide a few examples here:

- The federal government relies on census data to allocate vast sums of money among and within States. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data. *See id.* at 596.

- State governments — including those among the Governmental Plaintiffs here — mandate the use of census data to draw intrastate political districts. *See id.* at 594-95, 612; *House of Representatives*, 525 U.S. at 333 n.4, 334; *see also, e.g.*, ECF No. 76-11 ("Brower Decl."), ¶ 16-18 (Minnesota); ECF No. 76-37 ("Rapoza Decl."), ¶ 5 (Rhode Island).

- State law requires the use of census data for various purposes, ranging from the allocation of governmental resources and imposition of expenses among local governments to the setting of utility fees and official salaries. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 612-13 (citing various state statutes).

- State and local governments — including those among the Governmental Plaintiffs here — rely on census data, including granular local-level "characteristic data," to perform essential government functions. New York City, for example, makes important decisions about how to allocate public services in reliance on demographic data derived from the census, as when its Department of Education redraws school zone boundary lines, ECF No. 76-21, ("Salvo Decl."), ¶ 15; when its Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities, *id.* ¶ 14; and when its Population Division uses age data to target services for aged individuals, *id.* ¶ 16.

Thus, inaccuracies in federal census data would affect state and local governments — and, by extension, their residents — in many ways, only some of which would be measurable. Critically, in many instances, that would be true even if the total population counts were not materially affected — because of the importance of accuracy at the local or subgroup level.[4]

C. The Citizenship Question Litigation and Its Aftermath

This is not the first time issues relating to the 2020 census have been brought in this District. On March 22, 2018, the Secretary announced that he had decided to include "a question about citizenship on the 2020 decennial census questionnaire," claiming "that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). Shortly thereafter, two groups of plaintiffs — including most, if not all, Plaintiffs here — filed suit in this District, alleging that the decision to include the citizenship question violated the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* On January 15, 2019, after an eight-day bench trial, Judge Furman issued detailed findings of fact and conclusions of law, holding that the Secretary's decision was arbitrary and capricious, contrary to law, and pretextual. *New York v. Dep't of*

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[4] Although less relevant here, accurate census data is also critical to others, including scholars and private-sector businesses. *See, e.g.*, Br. of *Amici Curiae* 16 Businesses & Business Organizations at 3, ECF No. 103-1 ("Businesses Amicus") ("The Census provides critical data that informs decision-making in both the private and public sectors. . . . Consequently, government action that threatens the accuracy of Census data directly harms the businesses nationwide that rely on that data."); MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 260-61 (2d ed. 2015) (describing how "[s]ocial scientists in university settings, in businesses, or in stand-alone research organization [have become] the market" for census data in the modern era). For instance, businesses rely on census data "to make a variety of decisions, including where to put new brick-and-mortar locations, how to market their products, and how to predict which products will be successful in a given market. . . . All of these things depend on the availability of accurate Census data." Businesses Amicus 2.

Commerce, 351 F. Supp. 3d at 516; *see id.* at 635-64. He vacated the Secretary's decision and enjoined its implementation. *See id.* at 671-80. The defendants filed a notice of appeal and a petition for certiorari before judgment in the Supreme Court. The Supreme Court granted their petition and then affirmed on the ground that the Secretary's stated rationale was pretextual. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2573-76. Thereafter, on consent, Judge Furman entered a permanent injunction barring the Secretary from asking persons about citizenship status as part of the 2020 decennial census. *See* Order at 2, ECF No. 653, *New York*, No. 18-CV-2921 (JMF) (S.D.N.Y. Aug. 7, 2019).

Shortly after the Supreme Court affirmed Judge Furman's judgment, the President responded with an Executive Order aimed at "compil[ing]" citizenship data "by other means." Collecting Information About Citizenship Status in Connection With the Decennial Census, Exec. Order No. 13,880 § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order directed "all executive departments and agencies" to provide to the Department "the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records." *Id.* § 3 at 33,824. The Executive Order explained that data identifying citizens would, among other things, "help . . . generate a more reliable count of the unauthorized alien population in the country," which "would," in turn, "be useful . . . in evaluating many policy proposals." *Id.* § 1 at 33,823. Noting that the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), had "left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" the Executive Order also explained that citizenship data could be used by states "to design State and local legislative districts based on the population of voter-eligible citizens." *Id.* § 1 at 33,823-24. The Executive

Order said nothing about using citizenship data for purposes of congressional apportionment. Similarly, in remarks he made when announcing the Executive Order, the President made no mention of using citizenship data in connection with congressional apportionment. *See* Remarks on Citizenship and the Census, 2019 DAILY COMP. PRES. DOC. 465 (July 11, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900465/pdf/DCPD-201900465.pdf.

D. The 2020 Census

On February 8, 2018 the Census Bureau promulgated the "Residence Rule" establishing the residence criteria for the 2020 census. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018) (the "Residence Rule" or the "Rule"). "The residence criteria are used to determine where people are counted during each decennial census." *Id.* at 5526. "[G]uided by the constitutional and statutory mandates to count all residents of the several states," the Rule explains, "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of 'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time. . . . This concept of 'usual residence' is grounded in the law providing for the first census, the Act of March 1, 1790, expressly specifying that persons be enumerated at their 'usual place of abode.'" *Id.* Applying these criteria, the Rule explains that all "[c]itizens of foreign countries living in the United States" are to be "[c]ounted at the U.S. residence where they live and sleep most of the time," with the exception of "[c]itizens of foreign countries living in the United States who are members of the diplomatic community" (who are counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live) and "[c]itizens of foreign countries visiting the United States, such as on a vacation or business trip" (who are not counted at all). *Id.* at 5533. Notably, during the notice-and-comment process, the

Census Bureau considered a comment "express[ing] concern about the impact of including undocumented people in the population counts for redistricting because these people cannot vote." *Id.* at 5530. But the Census Bureau decided to "retain the proposed residence situation guidance for foreign citizens in the United States," reiterating that "[f]oreign citizens are considered to be 'living' in the United States if, at the time of the census, *they are living and sleeping most of the time at a residence in the United States*." *Id.* (emphasis added).

The Census Bureau relies on various means to obtain census data, beginning with a questionnaire to which households are asked to self-respond and ending with a set of procedures known as "Non-Response Follow-Up" operations. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 521. The 2020 census count "officially began in the rural Alaskan village of Toksook Bay" on January 21, 2020. U.S. Census Bureau, *Important Dates*, U.S. CENSUS 2020, https://2020census.gov/en/important-dates.html (last visited September 7, 2020). Census operations were in full swing by mid-March, when the Census Bureau was confronted with the unprecedented challenge of the COVID-19 pandemic. On April 13, 2020, the Secretary and the Director announced that, due to the pandemic, the Census Bureau would temporarily suspend field data collection activities; seek a 120-day extension from Congress of the deadline "to deliver final apportionment counts"; and "extend the window for field data collection and self-response to October 31, 2020, which will allow for apportionment counts to be delivered to the President by April 30, 2021." *U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19*, U.S. CENSUS BUREAU (Apr. 13, 2020), https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html. In the following months, representatives of

the Census Bureau reiterated on multiple occasions that additional time was required to complete the apportionment count and deliver it to the President.[5]

The Census Bureau resumed field operations in May 2020. *See* U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* ("*Census Operations Adjustments*"), U.S. CENSUS 2020, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited Sept. 9, 2020). Despite the Census Bureau's earlier statements indicating the need for more time to complete the census, Director Dillingham announced on August 3, 2020, that the Census Bureau would end field operations on September 30, 2020, a month earlier than the previously announced deadline of October 31, 2020. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html; *see also* ECF No. 62 ("NGO Pls. Compl."), ¶¶ 10 & n.3, 114, 174 n.69. As of today, therefore, the census is still ongoing — with enumerators conducting in-person Non-Response Follow-Up work to ensure that any household that did not self-respond to the census is nonetheless counted as part of the "actual Enumeration." *See Census Operations Adjustments*; *see also* ECF No. 34 ("Gov't Pls.' Compl."), ¶ 130 & n.20. In fact, there is some doubt about the date on which these efforts will end and the counting will

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[5] *See, e.g.*, U.S. CENSUS BUREAU, OPERATIONAL PRESS BRIEFING – 2020 CENSUS UPDATE 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf (statement of Albert Fontenot, Assoc. Dir. for Decennial Census Programs) (explaining that the Bureau was "past the window of being able" to produce the apportionment count by December 31, 2020); *see also, e.g.*, Nat'l Conf. of Am. Indians, 2020 Census Webinar: American Indian/Alaska Native, YOUTUBE (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689 (statement of Tim Olson, Assoc. Dir. For Field Operations) (explaining that "[w]e have passed the point where [the Bureau] could even meet the current legislative requirement of December 31. We can't do that anymore. We've passed that for quite a while now.").

stop. On September 5, 2020, the Honorable Lucy H. Koh, United States District Judge for the Northern District of California, entered a temporary restraining order enjoining the Census Bureau from "implementing the August 3, 2020 [plan] or allowing to be implemented any actions as a result of the shortened timelines in the August 3, 2020 [plan]." *Nat'l Urban League v. Ross*, No. 20-CV-5799 (LHK), 2020 WL 5291452, at *4 (N.D. Cal. Sept. 5, 2020). A preliminary injunction hearing is scheduled in that case for September 17, 2020. *See id.*

E. The Presidential Memorandum

In the meantime — that is, with the census count still being conducted — on July 21, 2020, the President issued the Presidential Memorandum, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." Presidential Memorandum, 85 Fed. Reg. at 44,679. In it, the President declared that, "[f]or the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status . . . to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* at 44,680. "Excluding these illegal aliens from the apportionment base," the President posited, "is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* Additionally, the President asserted that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law" and that "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the

immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." *Id.* Referring to one State with "more than 2.2 million illegal aliens" — apparently California, *see* ECF No. 75 ("Pls.' Rule 56.1 Statement"), ¶ 4 — the Presidential Memorandum noted that "[i]ncluding 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." Presidential Memorandum, 85 Fed. Reg. at 44,680.

To implement this new "policy of the United States," the President directed the Secretary to provide him with two sets of data. First, the Presidential Memorandum mandates that, "[i]n preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy." *Id.* Second, "[t]he Secretary shall *also* include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations*, 83 FR 5525 (Feb. 8, 2018)." *Id.* (emphasis added). In other words, to the extent "feasible" or "practicable," the Secretary is now required to include *two* sets of numbers for each State in his report to the President under Section 141(b) of the Census Act: first, the total population as determined in accordance with the Residence Rule, which includes citizens of foreign countries "living in the United States," without regard for the legal status of such persons in this country, Residence Rule, 83 Fed. Reg. at 5533; and second, the total population *minus* the number of "aliens who are not in a lawful immigration status." Presidential Memorandum, 85 Fed. Reg. at 44,680.

F. This Litigation

On July 24, 2020 — only three days after the Presidential Memorandum — both the Governmental Plaintiffs and the NGO Plaintiffs filed their initial complaints. *See* ECF No. 1; 20-CV-5781, ECF No. 1.[6] In their now-amended Complaints, Plaintiffs contend that the Presidential Memorandum violates the Constitution's Enumeration Clause, as modified by the Fourteenth Amendment; is motivated by discriminatory animus toward Hispanics and immigrant communities of color, in violation of the equal protection component of the Fifth Amendment's Due Process Clause; coerces state and local governments and denigrates the equal sovereignty of the States in violation of the Tenth Amendment; violates the constitutional separation of powers by usurping the authority Congress delegated to the Secretary; constitutes an *ultra vires* violation of 2 U.S.C. § 2a and 13 U.S.C. § 141; violates the APA; and violates the Census Act's prohibition on the use of statistical sampling for purposes of congressional apportionment, *see* 13 U.S.C. §§ 141, 195. They seek a declaration that the Presidential Memorandum is unlawful, an injunction prohibiting Defendants from taking any action to implement or further the Memorandum, and writs of mandamus compelling the Secretary and the President to transmit figures that do not exclude illegal aliens based on immigration status.

The cases were initially assigned to Judge Furman alone, who consolidated them pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure. ECF No. 43, at 1. On August 5, 2020, Judge Furman held an initial pretrial conference by telephone. During the conference,

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[6] At least six other cases in four other Districts have been filed challenging the Presidential Memorandum. *See* Compl., *Common Cause v. Trump*, No. 20-CV-2023 (D.D.C. July 23, 2020); Compl., *Haitian-Ams. United, Inc. v. Trump*, No. 20-CV-11421 (D. Mass. July 27, 2020); Compl., *City of San Jose v. Trump*, No. 20-CV-5167 (N.D. Cal. July 27, 2020); Compl., *California v. Trump*, No. 20-CV-5169 (N.D. Cal. July 28, 2020); Compl., *Useche v. Trump*, No. 20-CV-2225 (D. Md. July 31, 2020); Second Am. Compl., *La Union Del Pueblo Entero v. Trump*, No. 19-CV-2710 (D. Md. Aug. 13, 2020).

Plaintiffs advised that they intended to immediately file a motion for summary judgment (or, in the alternative, a preliminary injunction), and Defendants advised that they intended to file a motion to dismiss. ECF No. 79 ("Aug. 5, 2020 Tr."), at 11, 27, 36-38; *see also* ECF No. 37 ("Joint Pre-Conference Ltr."), at 6. Noting that Plaintiffs disclaimed the need for any discovery in connection with their motion for summary judgment or a preliminary injunction, Judge Furman set an expedited schedule and cautioned that, "[i]f defendants believe[d]" upon seeing Plaintiffs' motion papers "that there is any need for discovery," they were required "to confer" with Plaintiffs "immediately and then submit a joint letter." Aug. 5, 2020 Tr. at 46.

At Plaintiffs' request, and without objection from Defendants, Judge Furman filed a formal request on August 7, 2020, for the appointment of a three-judge district court pursuant to 28 U.S.C. § 2284(b). *See* ECF No. 68; *see also* ECF Nos. 58, 65. On August 10, 2020, the Honorable Robert A. Katzmann, then the Chief Judge of the Second Circuit, designated Judges Wesley and Hall to serve as the other members of a three-judge panel to hear these cases. *See* ECF No. 82. Thereafter, the panel adopted the scheduling order previously entered by Judge Furman alone. *See* ECF No. 86.

Pursuant to that scheduling order, Plaintiffs filed their motion on August 7, 2020. *See* ECF No. 74. Plaintiffs seek summary judgment (or, in the alternative, a preliminary injunction) on only some of their claims, namely that the Presidential Memorandum violates the Enumeration Clause and Fourteenth Amendment and constitutes an *ultra vires* violation of the statutes governing the census and apportionment. *See* ECF No. 77 ("Pls.' Mem."), at 10-40. Plaintiffs' motion is supported by declarations of both fact and expert witnesses. *See* ECF No. 76 ("Colangelo Decl."); ECF No. 149 ("Goldstein Decl.").

In response, Defendants did not ask to depose Plaintiffs' declarants or request discovery of any kind; nor did they seek a hearing. Instead, on August 19, 2020, they filed their opposition to Plaintiffs' motion and a cross-motion to dismiss. *See* ECF No. 117. To the extent relevant here, they argue that the Court lacks jurisdiction to hear Plaintiffs' claims because they are unripe and Plaintiffs lack standing; that the Enumeration Clause and *ultra vires* claims fail because the decision to exclude illegal aliens from the apportionment base is a lawful exercise of the President's discretion with respect to the census and apportionment; that Plaintiffs are not entitled to injunctive relief because they cannot show irreparable harm; and that the President is not a proper defendant. *See* ECF No. 118 ("Defs.' Mem."). On August 28, 2020, the motions became fully briefed, *see* ECF No. 154 ("Defs.' Reply"), and on September 3, 2020, the Court held oral argument by telephone.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the admissible evidence and pleadings demonstrate "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (per curiam). A dispute over an issue of material fact qualifies as genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *accord Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The initial burden of establishing that no genuine factual dispute exists rests upon the party seeking summary judgment. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994). If the moving party shows a *prima facie* entitlement to summary judgment,

"the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006).

In ruling on a motion for summary judgment, a court must view all evidence "in the light most favorable to the non-moving party," *Overton v. N.Y. State Div. of Mil. & Naval Affs.*, 373 F.3d 83, 89 (2d Cir. 2004), and must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). To defeat a motion for summary judgment, the non-moving party must advance more than a "scintilla of evidence," *Anderson*, 477 U.S. at 252, and demonstrate more than "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party "cannot defeat the motion by relying on the allegations in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citation omitted).

STANDING AND RIPENESS

As noted, Plaintiffs move for summary judgment on two grounds: that Defendants' decision to exclude illegal aliens from the apportionment base violates the Enumeration Clause and the Fourteenth Amendment of the Constitution; and that it exceeds the authority granted by Congress in the statutes that govern the census and congressional apportionment. *See* Pls.' Mem. 10-40. Before reaching the merits of either argument, however, we must address Defendants' contention that we lack jurisdiction. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S.

83, 88-89 (1998) (noting that subject-matter jurisdiction cannot be assumed and is a "threshold question that must be resolved . . . before proceeding to the merits").

Defendants argue and move to dismiss on the ground that we lack jurisdiction for two reasons: because Plaintiffs fail to establish that they have standing to sue and because their claims are not yet ripe. Where, as here, the question is whether a plaintiff's injury is sufficiently "real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (citation omitted); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014); *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013) (quoting *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). Thus, courts often address them together under the single umbrella term of "standing," *see, e.g.*, *Susan B. Anthony List*, 573 U.S. at 157 n.5; *Nat'l Org. for Marriage*, 714 F.3d at 689 n.6, and we will do the same here. But there is a second, arguably distinct form of ripeness doctrine that Defendants invoke: prudential ripeness, which concerns whether a case that might qualify as a bona fide case or controversy is nevertheless better decided later. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (internal quotation marks and citation omitted)). We will begin with the issue of standing — the toughest issue in this case — and then turn briefly to prudential ripeness.

A. The Law of Standing

Article III of the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. This means that all suits filed in federal court must be "cases and controversies of the sort traditionally amenable to, and resolved by, the

judicial process." *Steel Co.*, 523 U.S. at 102. One way courts implement that requirement is by ensuring that "at least one plaintiff" in any federal case has "standing." *Dep't of Commerce v. New York*, 139 S. Ct. at 2565; *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (noting that, in a case with multiple plaintiffs, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). Standing, in turn, is measured by a "familiar three-part test," which requires a plaintiff to show (1) "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." *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). The plaintiff must make this showing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To prevail on a motion for summary judgment, therefore, "mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability . . . ." *House of Representatives*, 525 U.S. at 329; *see Lujan*, 504 U.S. at 561 (stating that, on summary judgment, a plaintiff "can no longer rest on such 'mere allegations,'" as at the pleading stage, "but must 'set forth' by affidavit or other evidence 'specific facts'" that demonstrate standing. (quoting Fed. R. Civ. P. 56(e)).

Injury in fact is "the first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks, alterations, and citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks and citation omitted). Significantly, an injury "need not be actualized"

to satisfy Article III. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Instead, a "future injury" can suffice, so long as it is "certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 157 (internal quotation marks and citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (noting that plaintiffs need not "demonstrate that it is literally certain that the harms they identify will come about"); *House of Representatives*, 525 U.S. at 332-33 (finding standing "on the basis of the expected effects . . . on intrastate redistricting" — namely, that certain jurisdictions were "substantially likely . . . [to] suffer vote dilution"). Ultimately, the injury-in-fact requirement is meant to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks and citation omitted).

The second element requires proof that the plaintiff's injury is "fairly traceable" to the defendant's challenged conduct. Put differently, "there 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." *Lujan*, 504 U.S. at 560 (internal quotation marks, alterations, and citation omitted). Importantly, "[p]roximate causation is *not* a requirement of Article III standing, which requires only that the plaintiff's injury be *fairly traceable* to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) (emphases added); *see also Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) ("[T]he 'fairly traceable' standard is lower than that of proximate cause."). Accordingly, "Article III 'requires no more than *de facto* causality.'" *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Relatedly, for an injury to be "fairly traceable" to a defendant's conduct, that conduct need not be "the very last step in the chain of

causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). Indeed, as the Supreme Court explained in finding that the plaintiffs challenging the decision to add a citizenship question to the census had standing, when a "theory of standing" relies "on the predictable effect of Government action on the decisions of third parties," traceability is satisfied. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566. This may be so "even when the decisions are illogical or unnecessary." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59 (2d Cir. 2020).

Third and finally, a plaintiff's injury must be "redressable" by the relief sought — that is, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). "[T]he very essence of the redressability requirement" is that a request for "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. But if there is "a likelihood that the requested relief will redress the [plaintiff's] injury," the requirement is satisfied. *Id.* at 103; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) ("[F]or a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."). Notably, the redressability requirement does not require a plaintiff to show that the relief sought will remedy all injuries alleged. Instead, "'the relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' In other words, a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 **(**1982) (citations omitted) (quoting

Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)). Nor need the plaintiff prove that judicial relief will remedy an injury entirely. It is enough that the "risk [of the alleged harm] would be reduced to some extent if [the plaintiffs] received the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007); *cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the [injury], a court does have power to effectuate a partial remedy.").

B. Facts Relevant to Standing

Plaintiffs press two categories of harm: (1) "harms stemming from the exclusion of undocumented immigrants in the apportionment count"; and (2) "harms caused by the Memorandum's deterrent effect on census participation." Pls.' Reply 29. With respect to the first category, the Presidential Memorandum's express goal is to stop "[a]ffording congressional representation, and therefore formal political influence, to States on account of" their illegal alien population. Presidential Memorandum, 85 Fed. Reg. at 44,680. In particular, the Memorandum itself anticipates that excluding illegal aliens from the apportionment count could reduce the number of representatives in States with large immigrant populations, noting explicitly that in "one State . . . home to more than 2.2 million illegal aliens," *id.* — apparently, California, *see* Pls.' Rule 56.1 Statement ¶¶ 3-4 — the inclusion of illegal aliens could "result in the allocation of two or three more congressional seats than would otherwise be allocated," Presidential Memorandum, 85 Fed. Reg. at 44,680. In addition to the Memorandum itself, Plaintiffs proffer an expert analysis that concludes that the wholesale exclusion of illegal aliens from the apportionment base "is likely to have substantial effects on the population counts of each state" and, more specifically, "will almost certainly lead Texas to lose a seat in Congress"; would "likely . . . lead California and New Jersey to lose a congressional seat"; and "could lead other

states, such as Arizona, Florida, New York, or Illinois, to lose seats." ECF No. 76-58 ("Warshaw Decl."), ¶ 11.

With respect to the second category of harm, Plaintiffs submit a number of declarations — uncontested by Defendants — demonstrating the Presidential Memorandum's deterrent effect on participation in the decennial census, particularly among noncitizens, immigrants, and their family members, and, in turn, the adverse consequences that are likely to flow from that deterrent effect.[7] The Presidential Memorandum deters census participation for at least two distinct reasons. First, the Presidential Memorandum engenders fear and distrust among illegal aliens

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[7] Although Defendants do not dispute the facts in Plaintiffs' declarations, they argue that the declarations are "impermissibly conjectural, conclusory, and hearsay." Defs.' Mem. 12. Defendants are correct to point out that we "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue," but "may not rely on conclusory or hearsay statements contained in the affidavits." *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (internal quotation marks omitted). But Plaintiffs' declarations are not conclusory insofar as they describe with concrete detail the specific experience of various non-governmental and governmental entities. By way of example, several NGO Plaintiffs give specific and concrete evidence of the ways in which their operations have shifted to respond to the Memorandum. *See, e.g.*, ECF No. 76-18 ("Espinosa Decl."), ¶ 14; ECF No. 76-14 ("Choi Decl."), ¶¶ 17, 20-21; ECF No. 76-26 ("Khalaf Decl."), ¶ 15; ECF No. 76-36 ("Oshiro Decl."), ¶ 12; ECF No. 76-47 ("Torres Decl."), ¶¶ 22-23.

Furthermore, although the declarations do contain some inadmissible hearsay (e.g., where they report information secondhand), Defendants are incorrect in suggesting that, without it, the declarations are insufficient to support a showing that "the Presidential Memorandum would have an appreciable effect on the participation of illegal aliens" in the census. Defs.' Mem. 14-15. Many of the statements in Plaintiffs' declarations recount comments made by immigrants in response to the Presidential Memorandum, *see, e.g.*, ECF No. 76-17 ("Cullinane Decl."), ¶ 8; ECF No. 149-3 ("Espinosa Supp. Decl."), ¶ 5, which are admissible to prove state of mind, *see* Fed. R. Evid. 803(3). Additionally, references in the declarations to third-party statements are admissible to demonstrate the effect that these statements had on others — for example, that NGO Plaintiffs diverted resources in response to deterred census participation. *See, e.g.*, *United States v. Reed*, 639 F.2d 896, 907 (2d Cir. 1981). Finally, the declarations also contain information about the general atmosphere of fear, confusion, and apathy towards the census in various communities, information that is based on declarants' personal experiences working with and in those communities; this information is not a "statement" and, thus, not hearsay. *See* Fed. R. Evid. 801(a). In the discussion that follows, we rely on the declarations only to the extent they are admissible.

and their families (and, more broadly, all noncitizens and their families), and deters these groups from participating in the census out of fear of providing the federal government with information by which their citizenship status may be ascertained (and any resulting adverse consequences). Second, because the Presidential Memorandum announces that it is United States policy "to exclude from the apportionment base aliens who are not in a lawful immigration status," Presidential Memorandum, 85 Fed. Reg. at 44,680 — the "primary purpose of the census," *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 561 — illegal aliens may decide not to participate in the census on the theory that they do not count for any purpose or on the theory that there is little upside to being counted.

Several agency and non-profit organization leaders in charge of census outreach programs attest that many illegal aliens have expressed concern over, or outright refused to participate in, the census as a result of the Presidential Memorandum, both because they are apprehensive that the data will be used in immigration enforcement and because they perceive their participation as ultimately futile in light of the President's explicit exclusion of illegal aliens for the purposes of apportionment. *See, e.g.*, ECF No. 76-4 ("Baldwin Decl."), ¶ 8; ECF No. 76-5 ("Banerji Decl."), ¶ 5; Brower Decl. ¶ 11; Cullinane Decl. ¶ 8. Other immigrant respondents have expressed concern that "the Trump Administration would punish undocumented persons who filled out the Census by tracking and deporting them." *See, e.g.*, ECF No. 76-30 ("Matos Decl."), ¶¶ 9-13 (describing Delaware-based census advocacy program's increased need to quell community fears that, in light of the Presidential Memorandum, responding to the census will result in deportation or bar Latinos from obtaining citizenship).

Notably, Plaintiffs' evidence indicates that the effects of the Presidential Memorandum are likely to be felt beyond the *illegal* alien population. "Excluding undocumented immigrants

from the apportionment base will deter Census participation among the broader immigrant community, including family and household members of undocumented immigrants who are actually citizens or non-citizens with legal status." Espinosa Decl. ¶ 11; *see also* Khalaf Decl. ¶ 12 ("[S]ignificant fear and increased distrust about the Census . . . [is] not limited to undocumented immigrants or other non-citizens, but also to family, household members, friends, and community members of non-citizens, people for whom the new policy articulated in the Memorandum has generated fear about responding at all . . . ."). Of particular concern is the response in "mixed status households" — that is, households consisting of illegal aliens and residents with lawful status — where concerns about the security of identifying information being shared with the federal government are prevalent. *See, e.g.*, Espinosa Decl. ¶ 12 (describing a fear among individuals from mixed status households that "the Presidential Memorandum's exclusion of people 'not in lawful immigration status' from the census base count indicates that the Administration will use information from the census to attempt to identify undocumented immigrants for deportation or other adverse consequences"). "Even U.S.-born citizen Puerto Rican residents are confused" by the Presidential Memorandum. ECF No. 76-16 ("Colón Decl."), ¶ 11.

In addition to this extensive — and undisputed — record of fact witness testimony, Plaintiffs provide expert analyses describing the fear and confusion generated by the Presidential Memorandum among hard-to-count communities and the resultant chilling effect on census participation. *See* ECF No. 76-56 ("Barreto Decl."), ¶ 14 (surveying research on the impact of media messages on immigrant communities' trust in government and the impact of those communities' trust on census response rates and concluding that "the July 21 [Presidential Memorandum] will reduce participation in the 2020 census, and ultimately will reduce the

accuracy of the 2020 census"); ECF No. 76-57 ("Thompson Decl."), ¶ 3 (concluding that the Presidential Memorandum "will significantly increase the risk of larger total and differential undercounts, relative to previous censuses, for the hard-to-count populations, including immigrant communities").[8]

In short, the record supports a conclusion that the Presidential Memorandum has created, and is likely to create, widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate. *See* ECF No. 76-1 ("Alvarez Decl."), ¶ 10 (reporting "an increase in confusion amongst immigrant communities after" Memorandum was issued); *see also* Baldwin Decl. ¶ 8; ECF No. 76-9 ("Bird Decl."), ¶ 9. As John Thompson, the former Director of the Census Bureau, predicts, "the effects of the Memorandum on the current macro environment are *likely to be as great if not greater than the addition of a citizenship question*." Thompson Decl. ¶ 23 (emphasis added); *see also* Barreto Decl. ¶ 29. And the Census Bureau's own advertising

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[8] Defendants fault Dr. Barreto for failing to consider a 2019 study conducted by the Census Bureau, ELIZABETH A. POEHLER ET AL., U.S. CENSUS BUREAU, 2019 CENSUS TEST REPORT: A NEW DESIGN FOR THE 21ST CENTURY (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf ("2019 Census Test Report"), which found "no statistically significant difference in overall self-response rates" resulting from the inclusion of a citizenship question on the census questionnaire. *Id.* at ix; *see* Defs.' Mem. 13. But that study, which is not directly relevant to the issues before us, is less useful for Defendants than their arguments suggest, as there are findings that both sides can and do point to in support of their positions. In fact, the same study did find statistically significant drops in response rates "in some areas and for some subgroups," including "[t]racts with greater than 4.9 percent noncitizens," "[t]racts with greater than 49.1 percent Hispanic residents," "[t]racts with between 5.0-20.0 percent Asian residents," and "[h]ousing units within the Los Angeles Regional Census Center and New York Regional Census Center boundaries." *Id.* at ix-x. Furthermore, "the results of this [study] [we]re limited to the self-response timeframe prior to the start of" Non-Response Follow-Up operations, *id.* at 12, and there is reason to believe that each of Non-Response Follow-Up's steps would replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households, *see New York v. Dep't of Commerce*, 351 F. Supp. 3d at 583.

initiatives will struggle to ward off these effects even with "messag[ing] that respondent information is confidential" and that "[t]he Census Bureau will not share it with any outside entities, including law and immigration enforcement." Thompson Decl. ¶ 21.

These deterrent effects have far-reaching ramifications, including increasing costs for census outreach programs run by NGOs and governments. Indeed, the NGO Plaintiffs have already diverted resources from their other important programs to shore up their census engagement efforts. For example, Plaintiff FIEL "has recently had to refocus its programming and commit additional resources to its Census work," and "expects that it will need to interact with its constituents multiple times to answer questions and try to convince them to participate in the 2020 Census." Espinosa Decl. ¶ 14; *see also* ECF No. 76-44, ("Sivongxay Decl."), ¶ 18 ("[A]dditional one-on-one conversations and relational outreach are necessary to maintain trust among communities and census partners to ensure confidence that census information will remain confidential and that there are still important benefits to responding to the census, such as ensuring receipt of critical federal funding."). Because the Presidential Memorandum "dilutes the efficacy" of the efforts by Plaintiff New York Immigration Coalition ("NYIC") to ensure immigrants are counted in the census, NYIC will have "to divert resources from other programmatic areas to conduct additional education and outreach to get the same number of people to respond to the Census questionnaire." Choi Decl. ¶ 17. Specifically, NYIC has had to "make new materials"; "conduct new outreach"; "engage[] in member updates, press releases, [and] press briefings"; "develop[] messaging and social media campaigns"; and "respond to inquiries from local media . . . to assure people" that every person should respond to the Census. *Id.* In other words, "NYIC expects that it will need to interact with its constituents more times than previously planned to try to convince them to participate in the 2020 census" as a result of

the Presidential Memorandum. *Id.* ¶ 20. It estimates that the organization "will have to increase staff time and spending devoted to its Census education and outreach efforts by approximately 20% percent over previously anticipated levels." *Id.* ¶ 21.

Plaintiffs American-Arab Anti-Discrimination Committee ("ADC") and ADC Research Institute ("ADRCI") have also had to divert resources away from other programmatic areas, including critical programs responding to COVID-19 issues. Khalaf Decl. ¶ 15. In response to the Presidential Memorandum's messaging, ADC and ADRCI will "increase staff time and spending devoted [to] its Census education and outreach efforts by approximately 25[] percent over current levels," *id.* ¶ 14, while the national president of both organizations reports that he "personally spent at least 35 hours on Census-related work since the release of the [Presidential] Memorandum" that he would have otherwise spent on other tasks related to the operation and mission of both organizations, *id.* ¶ 15. Plaintiff Ahri similarly will increase staff time and spending devoted to census education and outreach by approximately fifteen percent in response to the chilling effects of the Presidential Memorandum. ECF No. 76-43 ("Seon Decl."), ¶ 17. According to Theo Oshiro, Deputy Director at the non-profit Make the Road New York ("MRNY), the Presidential Memorandum also "dilutes the efficacy of [MRNY's] existing materials and programming, which requires MRNY to divert resources from other programmatic areas to strategize around how to make [its] education and outreach effective and to get the same number of people to respond to the Census questionnaire" as they would have absent the Memorandum. Oshiro Decl. ¶ 12. Finally, Plaintiff CASA also has had to "devote additional resources to addressing the confusion and fear that have resulted" from the Presidential Memorandum, including having "to reorganize its communication team, reassign staff to Census outreach and education, and revise and redistribute messaging materials." Torres Decl. ¶¶ 22-23.

The Governmental Plaintiffs have also had to divert resources from other programs to mitigate the confusion caused by the Presidential Memorandum. Plaintiff Illinois, for example, has already had to spend funds on digital ads specifically designed to address misinformation about the census, has created printed materials to be distributed, and has produced social media videos and other digital communications to reassure the immigrant community about the importance of the census. Alvarez Decl. ¶ 12. Plaintiff Vermont, through its 2020 Complete Count Committee, has — in direct response to the Presidential Memorandum — provided "mini-grants" to increase outreach to hard-to-count communities, conducted additional open educational meetings, provided additional multilingual public service announcements, and otherwise promoted census participation. ECF No. 76-10 ("Broughton Decl."), ¶ 7. Plaintiff Monterey County will "have to dedicate significant resources to ensure participation without fear" so that the County receives its proper census-based funding. ECF No. 76-28 ("Lopez Decl."), ¶ 18; *see also* ECF No. 76-12 ("Bysiewicz Decl."), ¶ 11 (describing efforts by Plaintiff Connecticut to encourage full census participation after the Presidential Memorandum caused "confusion").

The Memorandum's chilling effect on census participation will likely also degrade the census data, harming state and local governments that rely on the data to carry out their public functions. As Dr. Joseph Salvo, Chief Demographer of New York City, explained, "the July 21, 2020 Presidential memorandum is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would." Salvo Decl. ¶ 12. Specifically, when individuals fail to participate in the census themselves, the Census Bureau will sometimes rely on "proxy respondents," like neighbors, landlords, and postal workers. *See* GLENN WOLFGANG ET AL., U.S. CENSUS BUREAU,

ANALYSIS OF PROXY DATA IN THE ACCURACY AND COVERAGE EVALUATION 1 (2003), https://www.census.gov/pred/www/rpts/O.5.PDF. Reliance on proxy responses "degrade[s] the quality of the data" and its usability, since proxy respondents often leave some questions unanswered and report information less accurately than household respondents. Brower Decl. ¶¶ 12-13 (discussing, for example, the phenomenon of "age heaping" where data on the age of individuals tends to be reported in numbers ending in 5 or 0 when a proxy is the respondent because the proxy merely estimates the age of the individual). Further, if census data are not available through proxy responses, demographers are forced to resort to data imputation, which itself is reliable only when calculated using a sufficiently high self-response rate. *See* ECF No. 76-21 ("Hardcastle Decl."), ¶ 5. Lower response rates also increase the margins of error in statistical calculations, degrading the utility of census response data and restricting Plaintiffs' ability to rely on the data for, *inter alia*, governmental planning purposes. *See* ECF No. 76-25 ("Kaneff Decl."), ¶¶ 3-5.

Indeed, degraded census data jeopardizes various sovereign interests in allocating funds and administering public works through programs that rely on quality census data. Connecticut, for example, relies on accurate characteristic data, meaning data on subgroups within the population, for a wide variety of purposes, including deciding where to locate COVID-19 testing sites, the evaluation of requests for school construction funds, the promulgation of affirmative action plans for state agencies using data-driven goals and benchmarks, effective forecasting for public transit planning, and others. *See* ECF No. 76-31 ("McCaw Decl.") ¶¶ 4-7. Similarly, Dr. Salvo explains that "[t]he decennial census is the statistical backbone of our country" and that, like Connecticut, New York City relies on accurate characteristic data about subgroups to make

decisions about public health programs and education investments, as well as emergency preparedness planning and provision of targeted services for the elderly. Salvo Decl. ¶¶ 13-17.

Other examples abound in the record. In Monterey County, California, for example, the Department of Social Services is responsible for administering cash and non-cash programs that, among other things, provide supplemental food assistance, California's Medicaid program, foster care, adoption and aging assistance, and temporary assistance to needy families. ECF No. 76-32 ("Medina Decl."), ¶ 2. That department relies on accurate census data in making its funding allocation decisions. *Id.* ¶ 4. Any undercounting of undocumented immigrants caused by the Presidential Memorandum will not only "impact the formulas used for funding allocations" for these basic living assistance programs, but will also result in the loss of federal funding, "which, in turn, will add extra financial burden on local governments, resulting in even fewer available resources to assist families with food, housing, health, and other support and safety net services." *Id.*; *see also, e.g.*, ECF No. 76-33 ("Mohammed Decl."), ¶¶ 5-6 (describing how the census directly impacts funding for the City of Pittsburgh and "provides the most reliable and complete data for research, decision making and planning in City government"); ECF No. 76-39 ("Rodriguez Decl."), ¶ 3 (describing how Illinois's Workforce Innovation and Opportunity Act Program, which provides services to help certain populations overcome barriers to employment, depends on accurate census data to identify the targeted population levels); ECF No. 76-46 ("Sternesky Decl."), ¶ 5 ("Census data deeply influences the way that [the New Jersey Housing and Mortgage Finance Agency] designs and plans for the allocation of housing funds across the state. For example, the Agency uses income, poverty, employment, housing density, and housing vacancy data from the Census to direct its annual $20 million to $25 million allocation of federal 9% Low-Income Housing Tax Credits (LIHTC). These credits are then used to

leverage roughly a ten-fold influx of private investment into equity for development costs to both high-opportunity and high-need areas of New Jersey."); ECF No. 76-50 ("Wortman Decl."), ¶¶ 3, 6 (describing how Illinois determines funding for each county based on an "index of need" and how "[u]nderrepresentation of areas with a higher percentage of immigrants will result in disproportionate levels of funding being allocated to counties with less demographic diversity").

Plaintiff Washington State will also be negatively impacted if it is forced to use inaccurate census data. Washington allocates $200 million "of state shared revenues . . . to counties and cities on a per capita basis annually" and uses decennial census data for its demographic estimates and annual population forecasts. Baldwin Decl. ¶¶ 14, 17. "[B]ad data will certainly lead to inaccurate distribution of funding within Washington, impacting all levels of government for a decade." *Id.* ¶ 15. "Poor quality census data will [also] harm Washington's ability to carry out the population data functions required by law both in the short term and the long term." *Id.* ¶ 28. In particular, Washington annually creates a *thirty*-year population forecast, meaning that the 2020 census data will be used in forecasting until at least the 2050 census data is available, if not longer. *See id.* ¶ 25. Because "many estimate and forecast models rely on information about changes in trends over time," "[a]n inaccurate census this year will change the relationships in the data between censuses and make all future estimates and forecasts based on these trends less accurate." *Id.*

Finally, the undisputed facts in the record also reflect that judicial relief invalidating the Presidential Memorandum would likely reduce the confusion felt by immigrant communities and therefore alleviate some of the injuries being felt by Plaintiffs. For example, Plaintiff FIEL anticipates that "a court order that stops the exclusion of undocumented immigrants from the census would make [its] efforts to encourage census participation easier by allowing [FIEL] to

clarify the confusion and help ease the fear caused by" the Presidential Memorandum, and that "it would take FIEL less time and fewer resources to convince" the community "to participate in the census." Espinosa Supp. Decl. ¶ 3. Relief would also help Plaintiff MRNY "conduct more efficient and effective census outreach" because MRNY could clarify to community members that everyone should, in fact, be counted. ECF No. 194-4 ("Oshiro Supp. Decl."), ¶ 5. And relief from this Court would also allow Plaintiff Ahri to "publicize the Court's order to encourage [its] community to open their doors to census outreach workers, rather than hiding out of confusion or fear and avoiding the census completely." ECF No. 194-5 ("Seon Supp. Decl."), ¶¶ 6-7.

C. Standing Analysis

As noted, Plaintiffs allege two types of harm: apportionment harms stemming directly from the exclusion of illegal aliens from the apportionment base and harms caused by the deterrent effect on census participation. We have considerable doubt that the former suffices to establish jurisdiction. To be sure, if any Plaintiff could show that, as a result of the Presidential Memorandum, it was likely to lose one or more seats in the House of Representatives, it would surely have standing. *See, e.g.*, *House of Representatives*, 525 U.S. at 331 (holding that the loss of a seat or seats in the House of Representatives "undoubtedly satisfies the injury-in-fact requirement of Article III standing"). But as of today, it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is "feasible" to do so at all. Oral Arg. Tr. 35-37. In the absence of that information, Plaintiffs' first theory of harm is likely "too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (internal quotation marks omitted). Nor, for these purposes, would there be any harm in waiting until January 2021, when the impact, if any, of the

Presidential Memorandum would be known, as the Supreme Court has held that an illegal apportionment can be remedied even after the apportionment process has taken place. *See Utah v. Evans*, 536 U.S. 452, 462-63 (2002).

Ultimately, however, we need not, and do not, decide the issue because we conclude that Plaintiffs' second theory of harm — that the Presidential Memorandum will have and, indeed, is already having, an effect on the census count itself — suffices to establish standing. Critically, this theory of harm does not depend on what, if anything, the Secretary does *in the future* to implement the President's mandate in the Presidential Memorandum. Instead, it is based on Plaintiffs' undisputed evidence that the Presidential Memorandum is affecting the census count *in the present*. That is, while the apportionment harms may well be too remote and hypothetical to support standing, the harms to the census count are "certainly impending" and do not depend on "a highly attenuated chain of possibilities." *Clapper*, 568 U.S. at 410. Notably, Defendants do not argue otherwise. Instead, they contend that Plaintiffs' second theory of harm is too "speculative" in a different sense: because Plaintiffs' evidence is inadequate to prove that the Presidential Memorandum has caused (or will cause) anyone to opt out of participating in the census or that judicial relief would redress that harm. *See* Defs.' Mem. 11-19. In defense counsel's view, Plaintiffs should be required "to identify some subset of people who would not have been chilled . . . from answering the census between April 1st and July 21st, then became chilled on July 21st after the memorandum was issued, and then will be unchilled in [the time remaining before the census ends] by an order of this Court." Oral Arg. Tr. 38; *see also* Defs.' Mem. 52 (citing lack of "rigorous survey[s] or statistical stud[ies] measuring whether [the Presidential Memorandum] . . . has any effect on response rates within immigrant communities").

Defendants' vastly overstate Plaintiffs' burden. The law does not require Plaintiffs to submit a randomized control trial or other rigorous statistical analysis demonstrating beyond peradventure that there are people who would have participated in the census but for the Presidential Memorandum and who would participate again if we were to grant Plaintiffs the relief they seek. Nor do Plaintiffs need to submit declarations specifically identifying such people, let alone submit declarations from such people. Instead, Plaintiffs need only demonstrate that "there is no genuine dispute as to any" fact material to the standing analysis. Fed. R. Civ. P. 56(a). Notably, in determining whether this standard has been met, we may rely not only on the declarations submitted by Plaintiffs in support of their motion, but also on common sense, basic economics, and reasonable inferences. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 183-85 (determining that "sworn statements . . . adequately documented injury in fact" where the proposition they were offered for was "entirely reasonable"); *Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 953 F.3d 178, 198 (2d Cir. 2019) (noting that a court may rely on "common sense and basic economics" in evaluating standing (internal quotation marks omitted)); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104-05 (2d Cir. 2018) (relying on the defendant agency's "own pronouncements," as well as "[c]ommon sense and basic economics," to find standing (internal quotation marks omitted)); *Carpenters Indus. Council v. Zink*e, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.) ("When performing that inherently imprecise task of predicting or speculating about causal effects [in standing analysis], common sense can be a useful tool."); *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (finding that Texas had established the necessary causal connection between the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and a future injury because DAPA would have "enable[d]" third parties "to apply for driver's licenses" and

there was "little doubt that many would do so"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Requiring Plaintiffs to do more would be particularly inappropriate here for two reasons. First, "the integrity of the census is a matter of national importance. As noted, the population count has massive and lasting consequences. And it occurs only once a decade, with no possibility of a do-over if it turns out to be flawed." *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 517; *see* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 ("1998 Appropriations Act"), § 209(a)(8), Pub. L. No. 105-119, 111 Stat. 2440, 2480-81 (1997) ("Congress finds that . . . the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted."). Second, Defendants' *own conduct* has forced Plaintiffs' hands. That is, for reasons that are unclear, the President waited until July 21, 2020, when the census was in full swing, to issue his Presidential Memorandum. Compounding matters, Defendants announced less than two weeks later that they were ending the census earlier than previously planned. The combination of the two meant that Plaintiffs had to rush to court and seek immediate relief; had they waited to develop more rigorous proof of their standing, their arguments about harms to the census count itself would have become moot. Between the sheer enormity of what is at stake and the fact that Defendants' own conduct gave Plaintiffs only a narrow window in which to seek effective relief, it would be the height of unfairness to hold Plaintiffs to the heightened burden of proof that Defendants endorse.

In light of the undisputed facts in the record, common sense, and basic economics, we are

satisfied that — with their second theory of harm — Plaintiffs adequately show injury in fact, traceability, and redressability and that we have before us an actual case or controversy "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. Moreover, Defendants "have failed to set forth any specific facts showing that there is a genuine issue of standing for trial." *House of Representatives*, 525 U.S. at 330.

1. Injury in Fact

To begin, Plaintiffs have proved that, in the wake of the Presidential Memorandum, some number of people will not participate in, and thus not be counted in, the census. As of August 3, 2020 — the day the Census Bureau announced that field operations would end a month earlier than previously planned, and approximately two weeks after the Presidential Memorandum was issued — the Census Bureau had counted only about sixty-three percent of households in the 2020 census. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count*, U.S. CENSUS BUREAU (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Many of those not counted are undoubtedly in the "hard to count" population, which includes immigrant and Hispanic populations as well as illegal aliens. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 577. The record in the citizenship question litigation and the declarations here make clear that this population is even "harder" to count during this census due to widespread concerns, fueled by the policies and rhetoric of this Administration, that census data will be used for immigration enforcement purposes. *See id.* at 562, 579-83; Colón Decl. ¶ 11; Oshiro Decl. ¶¶ 12, 14; Seon Decl. ¶ 16; Barreto Decl. ¶¶ 60-62. Plaintiffs' uncontested declarations and common sense indicate that the Presidential Memorandum has compounded, and will compound, these concerns, and that some number of people in these communities will choose not to

participate in the census and take steps to avoid being counted. *See, e.g.*, Cullinane Decl. ¶ 8; Espinosa Supp. Decl. ¶ 5. To be sure, on the present record, the Court cannot calculate with precision the number of people that will be so affected. But there is no doubt that that number is greater than zero, and there is a substantial likelihood that an appreciable number of people will be dissuaded from participating in the census. *See* Barreto Decl. ¶¶ 60-65.

From these ongoing and direct effects on the census flow several forms of injury to Plaintiffs and their members or citizens. First, insofar as Plaintiffs include or represent high concentrations of immigrant and Hispanic populations, the effects on the census undoubtedly create a risk of a net differential undercount that could result in the loss of political power and federal funds, two classic forms of Article III injury. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 607-08; *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (per curiam); Barreto Decl. ¶¶ 70-71; Thompson Decl. ¶¶ 13-17. Given the time sensitivities inherent in their claims of census-related injuries — there were little more than two months remaining for census operations when the President issued the Presidential Memorandum and, less than two weeks later, Defendants shortened that period by a full month — Plaintiffs have obviously not had an opportunity to perform any sort of empirical study on the size of the likely effects on the census that would reveal the likelihood of such injuries. In any event, the likelihood of two other forms of injury are more certain on the current record: degradation of the quality of, and ability to have confidence in, census data and diversion by the NGO Plaintiffs of organizational resources.

a. Degradation of Census Data

First, if a portion of the population does not participate in the census count, it will inevitably degrade the quality and accuracy of census data, even if only at the subgroup or local level. Salvo Decl. ¶¶ 8-12. That is particularly true if, as is the case here, the people who are not

counted are not evenly distributed across the population, but are concentrated, either geographically or demographically. *See* Barreto Decl. ¶ 83; Thompson Decl. ¶¶ 15-17, 23. The degradation of census data, in turn, harms the Governmental Plaintiffs' ability to allocate resources, such as educational and public health resources, efficiently and effectively. *See* McCaw Decl. ¶¶ 3-6; Medina Decl. ¶¶ 2-4; Baldwin Decl. ¶¶ 15-28. Separate and apart from that, it harms confidence in the census data. *See* Kaneff Decl. ¶ 5 ("The lower the response rate, the larger the margin of error in the demographic characteristics."). Crucially, these harms will occur *whether or not there is a net differential undercount* — meaning that this theory of injury does not depend on connecting the deterrent effect of the Presidential Memorandum on immigrant households and the like to a net differential undercount of people who live in such households. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 610-11; Salvo Decl. ¶¶ 14-18.

As explained in *New York v. Department of Commerce*, the degradation of census data is a legally cognizable form of injury sufficient to support standing. *See* 351 F. Supp. 3d at 610-15. In particular, a State or local government that relies on the information provided by the federal government under an existing statutory arrangement suffers a sufficiently "concrete" and "particularized" injury for purposes of Article III when the federal government degrades the quality of that information. States are sovereign entities with sovereign interests in the making and enforcement of their own laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (concluding that Maryland suffered an injury to its "law enforcement and public safety interests" from a lower-court order preventing the State from utilizing DNA samples for law enforcement purposes pursuant to a state statute). But they frequently do so in collaboration

with, or in reliance on, the federal government — such is the genius of the federal system, which has historically embraced various creative models of "cooperative federalism." *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167-69 (1992); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-89 (1981). States have long relied on federal decennial census data for countless sovereign purposes, and indeed many of the State Plaintiffs here even *require* the use of such data by law; in some instances, it is written into their state constitutions. *See, e.g.*, Rapoza Decl. ¶ 5 (explaining that the Rhode Island Constitution mandates using census data to establish the House and Senate districts); Brower Decl. ¶¶ 17, 22-23 (explaining that Minnesota law requires the use of census data to determine funding for roads and education).

Meanwhile, by virtue of the Constitution and the Census Act, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data. *See* U.S. Const. art. I, § 2, cl. 3; *see also Evans*, 536 U.S. at 478 (explaining that the Framers had a "strong constitutional interest in [the] accuracy" of the census); *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (holding that the conduct of the census must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," namely, obtaining an accurate count of the population in each State); 1998 Appropriations Act, Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481 ("Congress finds that . . . it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States . . . ."). When the federal government degrades the quality of that data, it therefore inflicts a cognizable injury on the sovereign interests of reliant States.[9]

[9] That does not mean that, in every case, a State will have a "right" to such data — or a right to data of a certain quality — sufficient to support a valid cause of action to obtain it. But it

An example may be helpful in illustrating the point. Suppose a State were to premise certain of its policies on a person's lawful presence in the United States — for example, suppose that it chose to deny certain benefits to undocumented immigrants or required its law-enforcement officials to inquire into the immigration status of any person detained in state custody for any reason. "The accepted way" for States "to perform [such] status checks" — and surely the most reliable — is to contact the DHS's Immigration and Customs Enforcement ("ICE"), the federal agency that accepts and responds to such inquiries from interested States. *Arizona v. United States*, 567 U.S. 387, 411 (2012). Now suppose that ICE were to degrade the quality of its data set, thereby undermining its usefulness to the State as a tool for implementing its policy priorities. If this hypothetical State were to challenge the decisions causing the degradation in immigration-status data, the federal agency could certainly defend its actions on the grounds that they were lawful. But could it seriously deny that the State had suffered a cognizable injury for purposes of standing? Surely not.

Indeed, ample case law supports the proposition that a State has a strong sovereign interest in conducting its own policy, the burdening of which causes an injury in fact for Article III purposes. One such sovereign interest is a State's "exercise of sovereign power over individuals and entities within [its] jurisdiction — this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601. Another such sovereign interest — which, in light of the frequent prohibition on *parens patriae* suits against the federal government, *see Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), is "distinct from . . . the general well-being of its residents" — is a State's "interest in securing observance

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does mean that a State suffers a concrete and particularized injury when the federal government degrades important tools of sovereignty — or takes those tools away altogether.

of the terms under which it participates in the federal system," *Alfred L. Snapp & Son*, 458 U.S. at 607-08; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . in defending the standards embodied in that code.").

The Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134, is instructive on this front. In that case, Texas led a coalition of States in a challenge to the Obama Administration's DAPA program. The Court held that the States had suffered a cognizable injury for purposes of standing because DAPA would have entitled its recipients to obtain driver's licenses under existing state law and providing those licenses would have come at a financial cost to Texas. *See id.* at 155-56. In denying a stay of the district court's preliminary injunction pending appeal, the Fifth Circuit cited *Alfred L. Snapp & Son*, explained that Texas possessed a sovereign interest in the maintenance of its own legal code, and held that "Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing." *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015). The court reasoned that "if pressure to change state law in some substantial way were not injury, States would have no standing to challenge *bona fide* harms because they could offset most financial losses by raising taxes or fees." *Id.* Several months later, the Fifth Circuit affirmed the preliminary injunction on the merits, reiterating and confirming its conclusions as to standing. The court held that "states may have standing based on . . . federal interference with the enforcement of state law, at least where the state statute at issue regulates behavior or provides for the administration of a state program and does not simply purport to immunize state citizens from federal law." *Texas*, 809 F.3d at

153 (alterations, footnotes, and internal quotation marks omitted). Such "intrusions," the court explained, "are analogous to pressure to change state law." *Id.*

Like the state plaintiffs in *Texas*, many Governmental Plaintiffs here have enacted their reliance on federal census data into law — in some cases, as noted, even into their constitutions. Moreover, as in *Texas*, "there is no allegation," let alone proof, that those jurisdictions enacted their laws or ratified their constitutions "to manufacture standing" in these cases. *Id.* at 159. If the census data is degraded (or even perceived to be degraded), these Plaintiffs will be subjected to a forced choice: They can use the degraded data, resulting in worse policy; they can spend money to compensate for the damage; or they can change their laws to relieve themselves of the legal obligation to use federal census data in making and enforcing their laws (which would presumably necessitate the expenditure of additional resources to collect data of their own anyway). Such "pressure[] to change state law constitutes an injury" within the meaning of Article III. *Texas*, 787 F.3d at 749; *see Texas*, 809 F.3d at 153. Accordingly, most, if not all, of the Governmental Plaintiffs have proved an imminent injury to their sovereign interests due to the degradation in quality of census data.

b. Diversion of Resources

Additionally, the risk that some hard to count population will not participate in census results in another form of injury: the diversion of resources. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the Supreme Court held that an organization can establish Article III injury in fact by proving "concrete and demonstrable injury to [its] activities — with the consequent drain on [its] resources." *See also id.* at 379 n.21 (holding that an organization that proves it "has indeed suffered impairment" in its activities has proved an Article III injury); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6

F.3d 898, 904-06 (2d Cir. 1993). In particular, "a nonprofit organization establishes an injury-in-fact if . . . it establishes that it spent money to combat activity that harms its organization's core activities." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (internal quotation marks omitted). "An organization need only show a 'perceptible impairment' of its activities in order to establish injury in fact." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (quoting *Ragin*, 6 F.3d 898 at 905).

As they did in *New York v. U.S. Department of Commerce*, Defendants appear to suggest that *Havens Realty* recognizes Article III injuries arising from organizational expenditures only where those expenditures are made in response to injuries that are themselves sufficiently imminent and impending to satisfy Article III. *See* Defs.' Reply 3; Oral Arg. Tr. 42-43; *see also New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Organizations asserting standing based on the diversion-of-resources theory do indeed need to "show that both the anticipated expenditures and ensuing harm to their organizations' activities are 'certainly impending,'" *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015) (quoting *Clapper*, 568 U.S. at 409), lest these plaintiffs be permitted to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm," *Clapper*, 568 U.S. at 416. But that standard does not mean that a plaintiff must allege a second form of independently adequate injury in fact, which "would render the category of plaintiffs that could establish standing under a *Havens Realty* theory a null set" and make *Havens Realty* a dead letter. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 616. Instead, however "inexact" the standard may be, "courts are inclined to find standing if it can be said that there is no better time to resolve the issues raised by the parties — that is, when they will be in no better position later than now." *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 237 (E.D.N.Y. 2019) (internal quotation marks omitted).

Plaintiffs satisfy these standards. First, Defendants do not dispute, and the Court has little trouble concluding, that the impairment alleged by NGO Plaintiffs goes to their core activities. *See, e.g.*, *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) ("The Organizations in this case have shown that Act 442's effect on their work goes far beyond 'business as usual.' They have done so through concrete evidence showing that Act 442 is already disrupting their operations . . . ."); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) ("The undisputed summary-judgment evidence established that [the plaintiff's] primary mission is voter outreach and civic education, particularly 'getting out the vote' among its members."). Each of the NGO Plaintiffs is primarily dedicated to serving and advocating for communities that have traditionally been undercounted by the census, and each is dedicated to promoting census participation in these communities. *See* Choi Decl. ¶¶ 3-6; Oshiro Decl. ¶¶ 2-5; Espinosa Decl. ¶¶ 2, 5-7; Khalaf Decl. ¶¶ 4-8; Seon Decl. ¶¶ 2-6; Torres Decl. ¶¶ 1, 5-11. In fact, several NGO Plaintiffs partner with the Census Bureau and/or state and local governments to promote census participation within these communicates. *See, e.g.*, Torres Decl. ¶ 11; Espinosa Supp. Decl. ¶ 6.

Second, Plaintiffs' uncontested declarations demonstrate that the NGO Plaintiffs have diverted resources in response to the Presidential Memorandum's chilling effects on participation in the census and the risks that poses for their members and their core activities. *See* Choi Decl. ¶¶ 14-27; Espinosa Decl. ¶¶ 14-17; Khalaf Decl. ¶¶ 8-16; Oshiro Decl. ¶¶ 15-17; Seon Decl. ¶¶ 17-19; Torres Decl. ¶¶ 2, 21-23; ECF No. 149-1 ("Awadeh Decl."), ¶¶ 4-5; Espinosa Supp. Decl. ¶¶ 7-8; Oshiro Supp. Decl. ¶¶ 2, 4; Seon Supp. Decl. ¶ 4.[10] For example, Steven Choi, the

[10] Plaintiffs provide evidence of similar resource diversions by similarly situated organizations, albeit not Plaintiffs here. *See* Banerji Decl. ¶¶ 5-6; Matos Decl. ¶¶ 9-14; Sivongxay Decl. ¶¶ 16-20, 23-24; ECF No. 76-51 ("Aranda-Yanoc Decl."), ¶ 8.

executive director of Plaintiff New York Immigration Coalition ("NYIC"), states that his organization had to develop new messaging and social media campaigns, and issue new member updates and press releases, to counter the Presidential Memorandum's contradiction of themes that had previously been core to NYIC's census outreach efforts. Choi Decl. ¶ 17. NYIC expects to increase staff time and spending by twenty percent over previously anticipated levels to achieve its census outreach and advocacy goals. *See id.* ¶ 21. Similarly, Plaintiff Ahri had to develop entirely new outreach materials, train staffers with new scripts, and respond to media inquiries; it expects to increase staff time and spending devoted to these efforts by fifteen percent as a result of the Presidential Memorandum. *See* Seon Decl. ¶¶ 17-19. Meanwhile, Plaintiffs ADC and ADRCI anticipate increasing staff time and spending devoted to Census efforts by approximately twenty-five percent as a result of the Memorandum, *see* Khalaf Decl. ¶ 14, and Plaintiff FIEL "anticipates having to divert approximately $5,000 from other mission critical programs and services to the 2020 Census education and outreach as a result of the Presidential Memorandum," Espinosa Decl. ¶ 15.

These resource diversions may not be large in absolute terms, but they constitute a "perceptible impairment" of the NGO Plaintiffs' activities and thus qualify as injuries in fact. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see OCA-Greater Hous.*, 867 F.3d at 612 ("[T]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." (internal quotation marks omitted)). In short, the NGO Plaintiffs "are dedicated to providing an array of legal and social services to non-citizens and they have expended significant resources to mitigate the [Presidential Memorandum's] impact on those they serve. In so doing, they have diverted resources that would otherwise have been available for other programming, a perceptible

opportunity cost that suffices to confer standing." *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 61 (internal quotation marks omitted); *see also Common Cause Ind.*, 937 F.3d at 952 ("According to the evidence put forward by the Organizations, Act 442 has created a culture of voter confusion, and it has already inflicted costs on them."); *OCA-Greater Hous.*, 867 F.3d at 612 ("[The plaintiff] went out of its way to counteract the effect of Texas's allegedly unlawful voter-interpreter restriction . . . with a view toward . . . mitigating its real-world impact on [the plaintiff's] members and the public . . . an undertaking that consumed its time and resources in a way they would not have been spent absent the Texas law. Hence, the Texas statutes at issue 'perceptibly impaired' OCA's ability to 'get out the vote' among its members.").

2. Traceability

Next, we have little trouble finding that these injuries in fact are fairly traceable to the Presidential Memorandum. Once again, the uncontested record and common sense satisfy Plaintiffs' burden. Plaintiffs demonstrate that the Presidential Memorandum's chilling effect on immigrant census participation is at least partially responsible for a degradation in the quality of census data. *See, e.g.*, ECF No. 76-24 ("Jimenez Decl."), ¶¶ 3-5 (explaining that the Memorandum's deterrence effect on immigrant household census participation will cause an undercount and a subsequent reduction in federal healthcare, infrastructure, and education funding for Plaintiff Monterey County); Salvo Decl. ¶ 12 (noting that the Presidential Memorandum "is likely to make the Census Bureau resort to less-reliable methods, including statistical imputation, more frequently in immigrant communities than it otherwise would" which will "result[] in poorer quality (less accurate) data both in terms of demographic characteristics as well as the actual count of persons"). NGO Plaintiffs have also made clear that the Presidential Memorandum is responsible for their diversion of resources; in other words, they are

expending resources they would not otherwise precisely because of the Presidential Memorandum. *See, e.g.*, Choi Decl. ¶¶ 20-21; Khalaf Decl. ¶¶ 14-15; Seon Decl. ¶ 17; Oshiro Supp. Decl. ¶¶ 3-4; Torres Decl. ¶¶ 22-23; Espinosa Supp. Decl. ¶ 4. This undisputed evidence satisfies Plaintiffs' burden to demonstrate the "*de facto* causality" that Article III demands. *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted).

In arguing otherwise, Defendants point out that Plaintiffs' theory of causation relies in part on the intervening actions of third-party actors, such as Spanish-language media disseminating information about the Presidential Memorandum. *See* Defs.' Mem. 16. "It makes little sense," they argue, "for Plaintiffs to attribute whatever harm is caused by those independent actors to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the risk of individuals' information being linked to immigration records and those individuals facing immigration enforcement." *Id.* (internal quotation marks and alterations omitted). More broadly, they assert that Plaintiffs' injuries are traceable to the "macro environment" of fear in the immigrant and Hispanic communities that predated the Presidential Memorandum, not to the Memorandum itself. *Id.* at 15-19.

These arguments are unpersuasive. For one thing, they ignore entirely Plaintiffs' evidence that the Presidential Memorandum has deterred, and will continue to deter, people from participating in the census because they conclude "that they don't see a benefit in filling out the census form if they will not be counted." Pls.' Mem. 43 (internal quotation marks and alterations omitted); *see, e.g.*, Choi Decl. ¶ 17; Cullinane Decl. ¶ 9; Matos Decl. ¶¶ 11, 13; Oshiro Decl. ¶¶ 10-12; ECF No. 76-38 ("Roche Decl."), ¶ 9; Torres Decl. ¶ 19; Espinosa Supp. Decl. ¶¶ 5-6. For such people, the chain of causation between the Presidential Memorandum and non-participation has only a single link. Thus, Plaintiffs need not and do not rely on the

dissemination of information by third parties to establish that certain illegal aliens will plausibly — even rationally — decide not to participate based *directly* on a correct understanding of the Presidential Memorandum's import.

Second, as noted above, the Supreme Court has long made clear that the defendant's conduct need not be "the very last step in the chain of causation." *Bennett*, 520 U.S. at 169. Indeed, the traceability requirement may be met even where several steps on the causal chain stand between the defendant's conduct and the plaintiff's injury. *Davis v. Federal Election Commission*, 554 U.S. 724, for example, involved a challenge to a campaign finance law that increased campaign contribution limits for any candidate whose opponent's personal campaign expenditures exceeded his own by a certain amount. At the time of filing, the plaintiff was at least three steps away from suffering any concrete harm: He had to spend a sufficient amount of his own money; his opponent had to refrain from a comparable level of self-funding; and his opponent had to then take advantage of the law by accepting heightened contributions. Even so, the Court found that the plaintiff faced a "real, immediate, and direct [injury] . . . when he filed suit." *Id.* at 734. Notably, the Court deemed that assumption valid based on little more than evidence that "*most* candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 735 (emphasis added). Moreover, the Court did not require proof that the government conduct had a coercive effect on the third party's action; evidence that allowed the Court to predict how the third party would likely act in response to the government action was sufficient. *See id.*; *see also Lujan*, 504 U.S. at 562 (noting that, when injury depends on the conduct of third parties, it is sufficient to show "choices have been or *will be* made in such manner as to produce causation and permit redressability" (emphasis added)); *Nat. Res. Def. Council*, 894 F.3d at 104-05 (finding "the agency's own pronouncements," as well as "[c]ommon

sense and basic economics," supported a conclusion that an "increased penalty has the potential to affect [third parties'] business decisions and compliance approaches" in a manner that would result in harm to the petitioners (internal quotation marks omitted)).

In light of these principles and cases, Defendants' arguments are unpersuasive. At the end of the day, they are little more than a rehash of Defendants' arguments in the citizenship question litigation, which were rejected. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries depended on the intervening acts of third parties influenced by misinformation — namely, that the federal government could use their census answers for law enforcement and immigration enforcement purposes. *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 623-24. There, like here, Defendants argued that Plaintiffs' injuries were not "fairly traceable" to their conduct because the injuries were attributable to an independently existing macro environment of fear permeating the immigrant and Hispanic communities. *Id.* at 621-22. Yet the Supreme Court rejected those arguments. As that Court reaffirmed, "Article III requires no more than *de facto* causality," a standard that is met where Government action has a "predictable effect . . . on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (internal quotation marks omitted). Here, as in the citizenship question litigation, Plaintiffs have proved that their injuries arise from the predictable effects of Government action, however rational or reasonable those effects may be.

3. Redressability

Finally, we conclude that Plaintiffs satisfy the redressability requirement as well. To be sure, Plaintiffs have not proved — and perhaps could not prove — that a favorable ruling would lead everyone who has decided, or will decide, not to participate in the census as a result of the

Presidential Memorandum to change course. But Plaintiffs' burden is not to show that a favorable court ruling would fully remedy the injuries that they have suffered or will suffer. Instead, they need show only that the "risk [of harm] would be reduced *to some extent* if [they] receive[] the relief they seek." *Massachusetts v. E.P.A.*, 549 U.S. at 526 (emphasis added); *see also CREW*, 953 F.3d at 194 (finding the redressability requirement satisfied because "it logically follows that relief would redress [the plaintiffs'] injury — at least to some extent"); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 716 (6th Cir. 2015) ("[I]t need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement.").

The Supreme Court's decision in *Massachusetts v. E.P.A.* is instructive. There, Massachusetts and other States challenged the EPA's decision not to regulate four greenhouse gases within the United States. On appeal, the Supreme Court held that the States had standing to challenge the EPA's decision based on their showing, through "unchallenged affidavits," that climate change was caused by greenhouse gases and caused various harms. 549 U.S. at 522. The Court did so despite the EPA's contention that there was no "realistic possibility" that the relief sought "would mitigate global climate change and remedy their injuries," particularly "because predicted increases in greenhouse gas emissions from developing nations" were "likely to offset any marginal domestic decrease." *Id.* at 523-24. The Court explained:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed . . . is essentially irrelevant. Nor is it dispositive that developing countries . . . are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Id. at 525-26 (citation and footnote omitted). Notably, the Court did not demand empirical proof that the remedy sought would have any marginal effect on global warming. The causal

connection between greenhouse gases and climate change, combined with the EPA's "ardent support for various voluntary emission-reduction programs" (with which the "EPA would presumably not bother . . . if it thought emissions reductions would have no discernable impact on future global warming"), was enough. *Id.* at 526 (internal quotation marks omitted). Because the relief sought would reduce the risk of injury "to some extent," the States had standing. *Id.*

Here too, Plaintiffs' uncontested affidavits show that the relief they seek — a declaration that the Presidential Memorandum is unlawful and an injunction barring any effort to implement it — would reduce "to some extent" their risk of suffering injuries relating to the census. If anything, the record here provides even more support for a finding of redressability than the record in *Massachusetts v. E.P.A.* did. First, as discussed above, Plaintiffs have provided proof that there are likely people who have decided, or will decide, not to participate in the census for the simple reason that, under the Presidential Memorandum, they will not count for apportionment purposes. A court order invalidating the Presidential Memorandum would redress that harm in a straightforward manner. *See, e.g.*, *Carpenters Indus. Council*, 854 F.3d at 6 n.1 (Kavanaugh, J.) ("[I]f a government action causes an injury, enjoining the action usually will redress that injury."). Second, Plaintiffs' uncontested declarations provide evidence supporting a finding of redressability. Plaintiff Ahri, for example, explains that the injunction barring the citizenship question was useful in quelling concerns in the community it serves and that an order granting relief in this case would similarly make its census outreach efforts more efficient and effective. Seon Supp. Decl. ¶¶ 4-7; *see also* Oshiro Supp. Decl. ¶ 5; Espinosa Supp. Decl. ¶ 8. And Plaintiffs submit an expert report noting that injunctions barring implementation of other immigration-related executive actions have had "measurable consequences on promoting trust among immigrant communities and influencing behavioral interactions with various aspects of

government." *See* Barreto Decl. ¶¶ 66-69. In short, we find that Plaintiffs' requested relief would "likely . . . at least diminish further instance of" Plaintiffs' census-related harms. *CREW*, 953 F.3d at 194. Indeed, "[b]ecause Plaintiffs have successfully alleged" that these harms are "ongoing, it logically follows that relief would redress their injury — at least to some extent, which is all that Article III requires." *Id.*

Only two of Defendants' counterarguments warrant further discussion. First, Defendants maintain that Plaintiffs' census-related injuries would not be remedied by a ruling in Plaintiffs' favor because the alleged "'macro environment' of mistrust around immigration" would remain. Defs.' Mem. 19. But that is akin to the argument the EPA made, and the Supreme Court rejected, in *Massachusetts v. E.P.A.*: that granting relief would not remedy the States' injuries because there were other, independent causes for those injuries — namely, the emissions of developing nations — that would persist. *See* 549 U.S. at 524. Put differently, the mere fact that the Presidential Memorandum causes only incremental harms, and that there are other causes of those same harms, does not defeat a finding of redressability. *See id.* ("EPA overstates its case. Its argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.").

Second, Defendants suggest that Plaintiffs cannot show redressability because "appellate review would likely last well past the end of the conduct of the census." Defs.' Reply 4. Conspicuously, however, Defendants cite no authority for the novel proposition that the availability of higher court review and the possibility of reversal can render a dispute nonjusticiable. Taken to its logical conclusion, that argument would suggest that a plaintiff could never obtain emergency relief in the face of a looming deadline. Far from rejecting such claims, courts routinely hear them on an expedited basis (as we have done here). *See, e.g.*,

League of Women Voters of N. Carolina v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (noting that in the election context, "once the election occurs, there can be no do-over and no redress" making "injur[ies] to . . . voters real and completely irreparable if nothing is done"). Finally, it bears mentioning that it is *Defendants' own conduct* that has put Plaintiffs in such a precarious position. The President could have issued his Presidential Memorandum well before the census began, in which case Plaintiffs would have had ample time to obtain a definitive ruling on their claims to preempt any chilling effect. Or he could have waited until census operations were over, in which case there would have been no risk of the census-related harms that Plaintiffs seek to remedy. Instead, for unknown reasons, the President waited more than a year after the Supreme Court rejected the citizenship question to issue his Presidential Memorandum, at which point the census was (and still is) in full swing. It would be perverse to conclude that, through their own conduct, Defendants could prevent Plaintiffs from even obtaining a hearing on their claims.

4. Conclusion

In the final analysis, "the gist of the question of standing" (and constitutional ripeness) "is whether [the plaintiffs] have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. E.P.A.*, 549 U.S. at 517 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). That is, the standing requirement "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* (quoting *Lujan*,

504 U.S. at 581 (Kennedy, J., concurring). Based on our thorough review of the record — including the uncontested declarations submitted in support of Plaintiffs' motion — and the well-established standards for determining whether a plaintiff has standing, we are confident we have jurisdiction to proceed.[11]

D. Prudential Ripeness

As noted, Defendants also invoke the prudential ripeness doctrine. *See* Defs.' Mem. 6-10; Defs.' Reply 1-2. Unlike standing and constitutional ripeness, prudential ripeness does not relate to the Court's jurisdiction. Instead, "when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later and that the parties will not have constitutional rights undermined by the delay." *Simmonds*, 326 F.3d at 357. The "ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry*

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[11] Defendants do not argue that we should engage in a zone-of-interests analysis, which the Supreme Court has sometimes described as a component of "prudential standing." *Lexmark Int'l*, 572 U.S. at 127 n.3. Accordingly, they have waived the argument. *See Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 128 (2d Cir. 2020) (holding, after *Lexmark*, that the zone-of-interests test is not jurisdictional); *see also, e.g.*, *Young v. Conway*, 698 F.3d 69, 85 (2d Cir. 2012) ("It is well-settled that non-jurisdictional arguments and defenses may be waived . . . ."). In any event, in light of *Lexmark*'s observation that "the zone-of-interests analysis . . . asks whether this particular class of persons has a right to sue under this substantive statute" and "whether a *legislatively conferred* cause of action encompasses a particular plaintiff's claim," 572 U.S. at 127 (emphasis added) (alterations, citations, and internal quotation marks omitted), we doubt that it has any application here, as the claims on which Plaintiffs move are constitutional and equitable in nature. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670, 700-02 (9th Cir. 2019).

Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see Nat'l Org. for Marriage*, 714 F.3d at 691.[12]

"To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry," evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Nat'l Org. for Marriage*, 714 F.3d at 691 (internal quotation marks omitted). The first step of the inquiry "is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008) (internal quotation marks and alterations omitted). "In assessing th[e] possibility of hardship, we ask whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 134 (internal quotation marks omitted). The two-step inquiry requires consideration, in turn, of three factors: "(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*, 523 U.S. at 733.

Considering these factors here, we conclude that the test for prudential ripeness is "easily satisfied." *Susan B. Anthony List*, 573 U.S. at 167. First, given that Plaintiffs' alleged census-related harms are occurring now, and can be remedied only if we rule on their claims before census operations conclude in a matter of days or weeks, delaying review would cause Plaintiffs

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[12] In recent years, the Supreme Court has cast doubt on the "continuing vitality of the prudential ripeness doctrine," on that ground that it "'is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (internal quotation marks omitted). But because neither the Supreme Court nor the Second Circuit has abandoned the doctrine yet, we are bound to consider Defendants' arguments here.

grave hardship. *See Chamber of Commerce of U.S. v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam) (finding a challenge to an Executive Order announcing a policy of the executive branch ripe where "the injury alleged . . . [is that] the mere existence of the Order alters the balance of bargaining power between employers and employees by creating a disincentive for employers to hire replacement workers"). Justice delayed would indeed be justice denied. Moreover, because there are no do-overs for the census, the adverse consequences of that delay could resonate for a decade, until the next decennial census. Second, although Defendants assert in conclusory fashion that judicial intervention "would inappropriately interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise," Defs.' Reply 2 (internal quotation marks omitted), that assertion borders on frivolous. On its face, the Presidential Memorandum does not purport to regulate the actual conduct of the census, *see* Presidential Memorandum, 85 Fed. Reg. at 44,679 ("Excluding Illegal Aliens From the Apportionment Base *Following* the 2020 Census" (emphasis added)), and Defendants themselves concede that it "does *not* affect how the Census Bureau is conducting its remaining enumeration operations," Defs.' Mem. 12. Moreover, as discussed below, relief can be crafted to minimize, if not eliminate, interference with administrative action. And finally, although the standing-related question of whether or to what extent Plaintiffs would suffer apportionment-related harms would benefit from further factual development, the gravamen of Plaintiffs' claims — that the President lacks the authority to exclude illegal aliens from the apportionment base — "presents an issue that is 'purely legal, and will not be clarified by further factual development.'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Thomas,* 473 U.S. at 581).

Thus, we conclude there is no basis to defer consideration of Plaintiffs' claims on ripeness ground. The fact that the Presidential Memorandum contains something akin to a "savings clause" — namely, that it is "the policy of the United States to exclude" illegal aliens from the apportionment base "*to the maximum extent feasible and consistent with the discretion delegated to the executive branch*," Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added) — does not alter that conclusion. Where, as here, the President's proclamation "unambiguously commands action" such that "there is more than a 'mere possibility that some agency might make a legally suspect decision,'" such a "savings clause does not and cannot override" the proclamation's "meaning." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018) (quoting *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002)). Indeed, savings clauses must be "read in their context, and they cannot be given effect when the Court, by rescuing the . . . measure, would override clear and specific language." *Id.* at 1239. In this case, the President explicitly declares that "it is the policy of the United States to exclude" illegal aliens "from the apportionment base," an unambiguous directive that, as discussed above, is having immediate and ongoing effects. Moreover, the Presidential Memorandum mandates that this policy be effected "*to the maximum extent*" feasible and consistent with law. Presidential Memorandum, 85 Fed. Reg. at 44,680 (emphasis added). Given that "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), we must and do presume that the Secretary and the Census Bureau will abide by the President's directives and work diligently to help exclude illegal aliens from the apportionment base to the maximum extent possible. Whether doing so would be a lawful exercise of the President's authority is a pure legal question that can be addressed now.

THE MERITS

In their motion, Plaintiffs seek relief on two grounds: first, they argue that the Presidential Memorandum violates Article I and the Fourteenth Amendment to the Constitution; and second, they contend that it constitutes an *ultra vires* violation of the laws governing the census and apportionment. Pls.' Mem. 1-2. On the latter front, Plaintiffs insist that the Presidential Memorandum exceeds the powers delegated by Congress in 13 U.S.C. § 141 and 2 U.S.C. § 2a in at least two ways: (1) because it contemplates calculating apportionment using tabulations other than those produced by the census and (2) because it seeks to exclude illegal aliens from the apportionment base regardless of whether they are "persons in" a "State" as those terms are used in Section 2a(a). *Id*. at 27-36.

Although Plaintiffs urge us to decide both their constitutional claims and their statutory claims, and the parties focus mostly on the constitutional issues, courts have long been admonished not to "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. TVA,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *accord Slack v. McDaniel*, 529 U.S. 473, 485 (2000); *House of Representatives*, 525 U.S. at 343-44. Accordingly, we begin — and, as it turns out, end — with Plaintiffs' statutory claims. In doing so, of course, "we start with the text of the statute." *Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020). "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (internal quotation marks omitted). We may look to legislative history and other tools of statutory construction if the statutory terms are ambiguous or "to corroborate and fortify our

understanding of the text." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring).

A. Apportionment Must Be Based on the Results of the Census Alone

Plaintiffs' first argument is that the Presidential Memorandum violates the statutes governing the census and apportionment by producing apportionment figures that are not based solely on the decennial census. This argument relies on the interplay between Section 141 and Section 2a. Subsection (a) of the former requires the Secretary to conduct the "decennial census of population." 13 U.S.C. § 141(a). Subsection (b) then requires the Secretary to report to the President "[t]he tabulation of total population by States under subsection (a) of this section" — that is, *under* the "decennial census" — "as required for the apportionment of Representatives in Congress." *Id.* § 141(b). Section 2a(a), in turn, requires the President to transmit to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled . . . by the method known as the method of equal proportions . . . ." 2 U.S.C. § 2a(a). By its terms, therefore, Section 141 calls for the Secretary to report a single set of numbers — "[t]he tabulation of total population by States" under the "decennial census" — to the President. And Section 2a, in turn, "expressly require[s] the President to use . . . the data from the 'decennial census'" in determining apportionment. *Franklin*, 505 U.S. at 797. That is, once the final decennial census data is in hand, the President's role is purely "ministerial." *Id.* at 799.

Legislative history and the longstanding understanding of the Executive Branch itself confirm that the Secretary's "tabulation," and the President's apportionment calculations, must be based on decennial census data alone. Significantly, the statutes first took their current form

in 1929, after a decade-long stalemate over the method for calculating the reapportionment following the 1920 census. *See id.* at 791-92. Congress responded to this problem by creating an "automatic reapportionment" scheme that would be "virtually self-executing." *Id.* at 792. In particular, the scheme created an "automatic connection between the census and the reapportionment"; indeed, that was "*the* key innovation of the Act." *Id.* at 809 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). The Senate Report accompanying the bill explained in reference to the next census:

> The census would be taken in November, 1929. One year later, *with these figures in hand*, the President would report *the census figures*, together with a table showing how, *under these figures*, the House would be apportioned . . . pursuant to a purely ministerial and mathematical formula . . . . Precisely the same process would protect reapportionment in each subsequent decennium.

S. Rep. No. 71-2, at 4 (1929). Along similar lines, the House Report explained that, under the bill, "the House is reapportioned in accordance with the tabulation transmitted by the Secretary of Commerce . . . ; the tabulations transmitted to Congress are on the basis of the 1930 census . . . ." H. Rep. No. 70-2010, at 4 (1929); *see also id.* at 7 (explaining that the Secretary, to whom the bill also originally assigned the task of reapportionment later assigned to the President, "is left with no discretionary power. He must use absolutely, without deviation, the population of each State *as gathered and reported by the Director of the Census*." (emphasis added)).[13]

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[13] Although we are wary of relying too heavily on floor statements by members of Congress, it is worth noting that Senator Vandenberg of Michigan, the principal sponsor the bill, reaffirmed that the legislation required the President "to report the result of a census" and to apply the reapportionment formula to "the result of the census." 71 Cong. Rec. 1613 (1929) (statement of Sen. Vandenberg). Elsewhere, he and Senator Walsh of Montana confirmed in a colloquy with Senator Swanson of Virginia "that the President is bound and has no discretion" but "to make the apportionment *according to the census*." *Id.* at 1845 (statement of Sen. Swanson) (emphasis added).

Similarly, its position in this litigation notwithstanding, the Department of Justice (the "Justice Department" or "DOJ") has long adhered to the view that the President's statement to Congress regarding apportionment has to be based solely on the tabulation of total population produced by the census. As the Justice Department explained more than forty years ago in *Federation for American Immigration Reform (FAIR) v. Klutznick*, "every inhabitant of a state the Census counts is included in the apportionment base. . . . The total resident population of the states is the apportionment base." Defs.' Reply Mem. & Opp'n at 11, 486 F. Supp. 564 (D.D.C. 1980) (No. 79-CV-3269), 1980 WL 683642, at *7 (citing H.R. Rep. No. 91-1314 (1970)).[14] Along similar lines, the Government acknowledged during oral argument in *Franklin v. Massachusetts* that "[t]he law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives" and that "[i]t would be unlawful . . . just to say, these are the figures, they are right, but I am going to submit a different statement." Oral Arg. Tr. at 12, *Franklin v. Massachusetts*, 505 U.S. 788 (No. 91-1502). "I think under the law he is supposed to base his calculation on the figures submitted by the Secretary." *Id.* at 13; *see also*, Reply Br. Appellants, *Franklin*, 505 U.S. 788 (No. 91-1502), 1992 WL 672612, at *15 (Apr. 20, 1992) ("[T]he method of equal proportions calls for application of a set mathematical formula to the state population totals *produced by the census*." (emphasis added)).

In short, this history confirms our reading of the statutes' plain terms: The Secretary is required to report a single set of figures to the President — namely, "[t]he tabulation of total

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[14] The House Report to which DOJ cited noted unambiguously that "the enumerated decennial census population is the basis for the apportioning of [the House] among the several States." H.R. Rep. No. 91-1314, at 3 (1970). Elsewhere, it summarized the three "elements" of the President's statement under Section 2a(a): "(1) The population of each State *as determined by the decennial census*; (2) The existing total number of Representatives (435); and (3) The apportionment which results from using a mathematical method known as the method of equal proportions." *Id.* at 2 (emphasis added).

population by States" under the "decennial census" — and the President is then required to use those same figures to determine apportionment using the method of equal proportions.

The Presidential Memorandum deviates from, and thus violates, these statutory requirements. Whereas the statute calls for the Secretary to include only the census figures in his report to the President, the Presidential Memorandum mandates that the Secretary provide a second set of figures as well: namely, the population of each State "exclud[ing]" illegal aliens. Presidential Memorandum, 85 Fed. Reg. at 44,680. The Presidential Memorandum leaves it to the Secretary how to come up with those figures, but they will necessarily be derived from something other than the census itself, as the 2020 census is not gathering information concerning citizenship or immigration status, and the 2020 census itself is counting illegal aliens. *See* Order at 1-2, *New York v. Dep't of Commerce*, 18-CV-2921 (JMF), ECF No. 653 (permanently enjoining the inclusion of a citizenship question on the 2020 census questionnaire); *see also* Presidential Memorandum, 85 Fed. Reg. at 44,680 (noting that "data on illegal aliens . . . relevant for the purpose of conducting the apportionment" may be available as a result of Executive Order 13880, which directed executive agencies "to share information with the Department of Commerce" regarding "the number of citizens, non-citizens, and illegal aliens in the country"). By doing so, the Presidential Memorandum violates Congress's mandate to use the results of the census — and only the results of the census — in connection with the apportionment process and the counting of them in the census pursuant the Residence Rule.

In arguing otherwise, Defendants rely almost exclusively on the Supreme Court's decision in *Franklin*, *see* Defs.' Mem. 40-42; Oral Arg. Tr. 48-54, but that reliance is misplaced. In *Franklin*, the plaintiffs brought two discrete challenges, one a constitutional challenge to the formula used in connection with reapportionment and one a challenge under the Constitution and

the APA to the conduct of the census — specifically, to the Census Bureau's decision to count federal employees serving overseas as residents of the State listed as their home of record in their personnel files. *See Massachusetts v. Mosbacher*, 785 F. Supp. 230, 233 (D. Mass. 1992). A three-judge district court rejected the first challenge, but agreed with the second. *See id.* at 267-68. On appeal from the latter ruling alone, the Supreme Court reversed. With respect to the plaintiffs' constitutional claim, the Court held that the Secretary's judgment "that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress" was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 505 U.S. at 806. With respect to the plaintiffs' APA claim, the Court held that the decision could not be challenged because the only final action affecting the States was the President's Section 2a(a) statement and the President does not qualify as an "agency" for purposes of the APA. *See id.* at 796-801. The Secretary's Section 141(b) report, the Court explained, "carries no direct consequences for the reapportionment" and, thus, "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798.

While addressing the question of whether the plaintiffs could bring a claim under the APA, the Court described the interplay between Section 2a and Section 141:

> After receiving the Secretary's report, the President is to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a). Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the "decennial census." There is no statute forbidding amendment of the "decennial census" itself after the Secretary submits the report to the President. For potential litigants, therefore, the "decennial census" still presents a moving target, even after the Secretary reports to the President. . . . Moreover, there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him. It is not until the President submits the information to Congress

> that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives.

505 U.S. at 797-98. The Court acknowledged that the President's role under Section 2a was "admittedly ministerial," but that "d[id] not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President." *Id.* at 799. Put simply, the Court concluded, "§ 2a does not curtail the President's authority" — pursuant to "his accustomed supervisory powers over his executive officers" — "to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Id.* at 799-800.

Defendants seize on this language to argue that the President has discretion to define who should be considered inhabitants — or "persons in each State," 2 U.S.C. § 2a(a); *see* U.S. Const. Art. I § 2, cl. 3 — for purposes of the census. Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 40-42; Def. Reply 9-10; Oral Arg. Tr. 47. That may or may not be true — we address it below — but it is beside the point for present purposes. *Franklin* does not suggest, let alone hold, that the President has authority to use something other than the census when calculating the reapportionment; indeed, the Court did not even consider the plaintiffs' challenge to the apportionment. At most, *Franklin* establishes that the President retains his "usual superintendent role" with respect to the conduct of the census — and can direct the Secretary to make "policy judgments *that result in 'the decennial census*.'" *Id.* at 799-800 (emphasis added); *see also id.* at 797-98 (referring to "amendment of the 'decennial census' itself" and "instruction by the President to the Secretary to reform the census").[15] But by

[15] Thus, defense counsel is wrong in suggesting that the *Franklin* Court blessed the use of a tabulation that was based on both the census and "separate records outside the census." Oral Arg. Tr. 52. The overseas personnel were counted as part of the census itself, resulting in a single "tabulation of total population by States" under the "decennial census." 13 U.S.C. § 141(a)-(b). That they were counted using administrative records rather than a questionnaire is

Defendants' own admission, that is not what the President did here. *See, e.g.*, Joint Pre-Conference Ltr. 5 ("Plaintiffs are not challenging some procedure that will be used in the actual census, but an apportionment number that will be chosen by the President after the census is complete."); Defs.' Mem. 12 ("[T]he Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations . . . ."); ECF No. 120 (Decl. of Albert E. Fontenot, Jr.) ¶ 12 ("The Presidential Memorandum . . . has had no impact on . . . the Census Bureau's commitment to count each person in their usual place of residence, as defined in the [Residence Rule].").

In short, contrary to Defendants' arguments, the statutory scheme enacted by Congress does not give the President authority to "choose" any set of numbers he wants "to plug into the 'method of equal proportions.'" Defs.' Mem. 42. Instead, Congress mandated that the President use a specific set of numbers — those produced by the decennial census itself — for purposes of the reapportionment. By deviating from that mandate, the Presidential Memorandum exceeds the authority of the President and constitutes an *ultra vires* violation of the statutes.

B. The Apportionment Base Cannot Exclude Illegal Aliens Who Reside in a State

The Presidential Memorandum also deviates from Section 2a(a) in defining "the whole number of persons in each State" to categorically exclude illegal aliens residing in each State. Once again, we begin with the plain language of the statute. Defendants do not dispute — in the Presidential Memorandum or in their briefs — that illegal aliens are "persons" within the meaning of the Section 2a(a), and for good reason. The ordinary meaning of the word "person" is "human" or "individual" and surely includes citizens and non-citizens alike. *See Plyler v.*

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of no moment, as Section 141(a) broadly delegates to the Secretary the authority to conduct the census "in such form . . . as he may determine." *Id.* § 141(a).

Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). Moreover, the U.S. Code is filled with other statutes that use terms that plainly exclude illegal aliens, such as "citizen" or "alien lawfully admitted." *E.g.*, 5 U.S.C. § 552a(a)(2). "Congress thus distinguishes between a 'citizen' and 'any person' when it wishes to do so." *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that the phrase "any person" in the Freedom of Information Act, 5 U.S.C. §§ 551 *et seq.*, includes non-citizens); *accord Stone v. Exp.-Imp. Bank of U. S.*, 552 F.2d 132, 136 (5th Cir. 1977); *see also, e.g.*, *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 729 (9th Cir. 2011) (holding that "any person" in the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, "means any person, including foreign citizens").

Instead, Defendants hang their hats on the four-word phrase "persons in each State." Presidential Memorandum, 85 Fed. Reg. at 44,679; *see* Defs.' Mem. 2, 29-30; Defs.' Reply 11. That phrase, they argue, has been construed to mean "inhabitants" or to turn on "usual residence," terms that are not self-defining and call for "the exercise of judgment." Presidential Memorandum, 85 Fed. Reg. at 44,679. That is true enough. *See Franklin*, 505 U.S. at 803-05 (noting that, since 1790, Congress and the Census Bureau have used words such as "inhabitant" and "[u]sual residence" to "describe the required tie to the State" and that defining the metes and bounds of these terms are not always clear). But it does not follow that illegal aliens — a category defined by legal status, not residence — can be excluded from the phrase. To the contrary, the ordinary definition of the term "inhabitant" is "one that occupies a particular place regularly, routinely, or for a period of time." *See* MERRIAM-WEBSTER'S COLLEGE DICTIONARY 601 (10th ed. 1997). And however ambiguous the term may be on the margins, it surely

encompasses illegal aliens who live in the United States — as millions of illegal aliens indisputably do, some for many years or even decades.[16]

The Presidential Memorandum provides two examples to support its conclusion that "[t]he discretion delegated to the executive branch to determine who qualifies as an 'inhabitant' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status," Presidential Memorandum, 85 Fed. Reg. at 44,679, but neither is remotely convincing. First, the Memorandum notes that "aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are 'persons' who have been excluded from the apportionment base." *Id.* True enough, but that is not based on their legal status. Instead, it is based on the fact that the United States is not their "usual residence." (Indeed, that is reflected in the Residence Rule.) Second, the Memorandum points to the fact that "overseas Federal personnel have, at various times, been included in" the apportionment base. *Id.* Once again, true enough. (Indeed, that was the issue in *Franklin*.) But that is based on the fact that the terms "usual residence" and "inhabitant" have "been used

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[16] Defendants argue that it is Plaintiffs' burden to show "that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment," Defs.' Mem. 39, and suggest that Plaintiffs cannot meet that burden because some categories of illegal aliens (e.g., aliens residing in a detention facility after being arrested while crossing the border) can be lawfully excluded, *see id.* at 27. But the examples Defendants proffer are arguably excluded (or excludable) based on their "usual residence," not their legal status. In any event, 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. Indeed, that arguably gets it backwards: If the President goes outside the bounds of the authority granted to him by Congress, a court's power to grant relief should not depend on how far outside the bounds he went. Notably, courts considering similar claims have not approached them in the manner Defendants propose. *See, e.g.*, *Hawaii v. Trump*, 878 F.3d 662, 690-92 (9th Cir. 2017) (concluding that a presidential proclamation exceeded the President's delegated authority under the Immigration and Nationality Act), *rev'd and remanded on other grounds*, 138 S. Ct. 2392 (2018); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1324, 1337-39 (D.C. Cir. 1996) (concluding that an executive order announcing a "policy of the executive branch" was *ultra vires* and invalid).

broadly enough to include some element of allegiance or enduring tie to a place" and to "include 'persons absent occasionally for a considerable time on public or private business.'" *Franklin*, 505 U.S. at 804-05 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 217 (Max Farrand ed., rev. ed. 1966) (statement of James Madison)). It is simply a non sequitur to suggest, as the Presidential Memorandum does, that just because the phrase "persons in each State" can be construed to *include* people who are "temporarily stationed abroad" but "retain[] their ties to the States," *id.* at 806, it can also be construed to *exclude* people who indisputably inhabit or reside in a State.

Defendants are on no firmer ground in arguing that illegal aliens can be excluded from "the whole number of persons in each State," as that phrase is used in Section 2a, because they "may be removed from the country at any time." Defs.' Mem. 39. A person living in a State but facing future removal is no less a "person[] in that State," Defs.' Reply 4 (internal quotation marks and alteration omitted), than someone living in the State without the prospect of removal. Moreover, many people in immigration custody or removal proceedings actually have *lawful* immigration status, *see, e.g.*, *Ragbir v. Homan*, 923 F.3d 53, 57-58 (2d Cir. 2019), and their placement in custody or removal proceedings does not necessarily render them unlawfully present. Notably, data reveal that immigration judges ultimately allow many aliens in custody or removal proceedings to remain in the United States. *See Immigration Judges Decide 57 Percent Entitled to Remain in U.S.*, TRAC IMMIGRATION (Aug. 17, 2016), https://trac.syr.edu/immigration/reports/435/. And many people initially designated as "undocumented" — including many intercepted at the border — ultimately obtain lawful status, such as asylum. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL

YEAR 2018, at 27 (2019), https://www.justice.gov/eoir/file/1198896/download. Nothing in Section 2a turns on such fluctuations and nuances in legal status.

Once again, legislative history and settled practice confirm our conclusion that "persons in each State" turns solely on residency, without regard for legal status. In looking to legislative history, we look not to the history surrounding the framing of the Constitution or the Reconstruction Amendments, even though the words in the statute mirror those in Article I and the Fourteenth Amendment. Instead, we look to 1929, when Section 2a was enacted and the words "whole number of persons in each State" entered the statutory lexicon. *See* Act of June 18, 1929, Pub. L. No. 71-13 § 22, 46 Stat. 21, 26. That is because our task is to interpret the statute itself, and we do so "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). That is not to say that the constitutional language is irrelevant to our task: The drafters of Section 2a used the same words as those in the Constitution, so their understanding of the constitutional language sheds light on their understanding — and the "ordinary public meaning" — of the statutory text "at the time of its enactment." *Id.* But it is their *understanding* of the constitutional language, *not* whether their understanding was correct (on which we need and do not opine), that matters. *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) ("It is a commonplace of statutory interpretation that Congress legislates against the backdrop of existing law." (internal quotation marks omitted)).[17]

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[17] For this reason, we need not and do not delve into the meaning of the terms "inhabitant" and "usual residence" at the time of the Founding or of the Reconstruction Amendments, or consider whether the concept of unlawful status was known to the Framers of Article I or the Fourteenth Amendment. There is no dispute that the concept of "illegal aliens" existed in 1929, when Section 2a was enacted. *See* Defs.' Mem. 36.

Notably, in enacting the 1929 Act that used the phrase "whole number of persons in each State," the Senate and the House both considered and rejected amendments that would have excluded non-citizens from the apportionment base. *See* 71 Cong. Rec. 1907 (1929) (Sen. Sackett proposes amending S.B. 312 to require the President's statement to Congress to show "the whole number of persons in each State, exclusive of aliens and excluding Indians not taxed"); *id.* at 2065 (vote on amendment by Sen. Sackett fails); *id.* at 2360-63 (House adopts alienage exclusion as amendment to the apportionment bill); *id.* at 2448-2455 (House adopts amendment of Rep. Tilson to remove the previously adopted alienage exclusion). What is more, opposition to these amendments was based not only on a view that "the whole number of persons in each State" should include every resident of each State, without regard to legal status; it was based also on a view that the Constitution mandated inclusion of illegal aliens residing in the United States. Senator David Reed, for instance, voiced support for an amendment excluding illegal aliens from the apportionment base as a matter of policy but opposed it on grounds of constitutionality and consistent practice. "Every Congress that acted on that part of Article I of the original Constitution and every apportionment that was made in reliance upon that article," he explained, "included all free persons literally. It excluded Indians not taxed and it excluded slaves, but every apportionment inhabitant[] who" was not a "citizen[] w[as] included." *Id.* at 1958. "That construction," he noted then, "has been continuous and consistent." *Id.*

Further evidence of the understanding of the phrase "whole number of persons in each State" in Section 2a is revealed by the opinion of the Senate's legislative counsel on the issue. "That the fourteenth amendment was framed with the intention of including aliens," he wrote, "is indicated by the rejection by the Congress of proposals to base representation on the number of

citizens and on the number of voters." *Id.* at 1822. Consistent with that understanding, Congress had always included aliens in the apportionment base:

> The practical construction of the constitutional provision by Congress in its apportionment legislation has been uniformly in favor of inclusion of aliens. No exception of noncitizens from the enumeration has been made under any past apportionment. The term "persons" necessarily either includes or excludes aliens; its constitutional meaning can not be changed by Congress; and the fact that it has from the beginning been construed to include aliens should be conclusive if the meaning was open to dispute.

Id. It was "therefore the opinion of [the legislative counsel's] office that there is no constitutional authority for the enactment of legislation excluding aliens from enumeration for the purposes of apportionment of Representatives among the States." *Id.* This prevailing view makes plain that when Congress directed the President to report the "whole number of persons in each State," it understood the phrase to include all who lived in each State, without regard for legal status, and that it did not grant to the President discretion to do by Memorandum what it could not do by statute.[18]

Not for nothing, until the Presidential Memorandum, the Executive Branch had also always taken the view that the 1929 Act, if not the Constitution, prohibited exclusion of illegal aliens from the apportionment base due to legal status alone. In defending against a 1980 challenge to *including* illegal aliens in the apportionment base, for example, the Department of Justice argued that "[t]he plain language of [the Act] maintains the Constitutional requirement of counting all inhabitants of the states, legal and illegal, for purposes of apportionment. . . .

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[18] For what it's worth, later Congresses took similar views. *See FAIR v. Klutznick*, 486 F. Supp. at 576-77 (three-judge court) (describing congressional debates); Stacy Robyn Harold, Note, *The Right to Representation and the Census*, 53 WAYNE L. REV. 921, 923 & n.15 (2007) (collecting congressional debates); *see also, e.g.*, *1980 Census: Counting Illegal Aliens: Hearing on S. 2366 Before the Subcomm. on Energy, Nuclear Proliferation & Fed. Servs. of the S. Comm. on Governmental Affairs*, 96th Cong. 12 (1980) (Senator Javits stating that the Constitution requires "the aggregate number of inhabitants, which includes aliens, legal and illegal").

Moreover, the long-established practice of both Congress and the Census Bureau of reading the Constitution to require the counting of illegal aliens for apportionment purposes ratifies this construction." Defs.' Reply Mem. & Opp. Pls.' Mot. Summ. J. 11, *FAIR*, 486 F. Supp. 564 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1967)). In 1988, the Justice Department took the position in a letter to Congress that excluding illegal aliens from the census and apportionment base would be unconstitutional, *see* Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Rep. William D. Ford (June 29, 1988) (reprinted in U.S. GOV'T PRINTING OFFICE, 1990 CENSUS PROCEDURES AND DEMOGRAPHIC IMPACT ON THE STATE OF MICHIGAN, 240-44 (1988)), a position it reaffirmed one year later, *see* Letter from Carol T. Crawford, Assistant Attorney Gen., to Sen. Jeff Bingaman (Sept. 22, 1989) (reprinted in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989)). And the Census Bureau itself has long "interpreted its constitutional charge *and its statutory mandate* to require counting every person [irrespective of citizenship status] who has a usual residence in any State." *Census Equity Act: Hearing on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*, 101st Cong. 68 (1989) (statement of Michael R. Darby, Under Sec'y of Commerce for Econ. Affairs) (emphasis added); *accord* Letter from Robert A. Mosbacher, Sec'y of Commerce, to Sen. Jeff Bingaman (Sept. 25, 1989) (reprinted in 135 Cong. Rec. S22,522 (daily ed. Sept. 29, 1989)).

In fact, since 1929 (if not before), the consistent view of both political branches has been that Section 2a, if not the Constitution, requires the inclusion of all residents in the apportionment base, without regard for their legal status. When pressed at oral argument to cite "any instance, any support . . . in the historical record" for the proposition that the President has discretion under Section 2a to exclude illegal aliens from the apportionment base, defense

counsel came up empty. Oral Arg. Tr. 46 ("We have not been able to identify any."). With admirable candor, albeit some understatement, he was compelled to concede that "[P]laintiffs' best argument is history, and that cuts the other way." *Id.* at 47.

With neither text nor history on their side, the only thing Defendants have remaining is their assertion that excluding illegal aliens from the apportionment base is "more consonant with the principles of representative democracy underpinning our system of Government." Presidential Memorandum, 85 Fed. Reg. at 44,680. That is certainly a defensible (though contestable) proposition. But it is also irrelevant. The Constitution gives to Congress the authority to regulate the census and to reapportion the House. In exercising that authority, and delegating responsibility to the Executive Branch, Congress adopted a different theory of Government, in which the House of Representatives represents the whole population, not a subset of the population, and there is "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). The President is not free to substitute his own view of what is most "consonant with the principles of representative democracy" for the view that Congress already chose.

The statutory command to use the "whole number of persons in each State" as the apportionment base does not give the President discretion to exclude illegal aliens on the basis of their legal status, without regard for their residency. In declaring that "it is the policy of the United States" to do so, and commanding the Secretary to take steps to carry out that policy, the Presidential Memorandum deviates from, and thus violates, Section 2a.

C. Conclusion

In sum, the Presidential Memorandum deviates from, and thus violates, the statutory scheme in two independent ways: first, by requiring the Secretary to include in his Section

141(b) report a set of numbers other than "[t]he tabulation of total population by States" under the "decennial census" and contemplating reapportionment based on a set of numbers other than "the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population"; and second, by excluding illegal aliens from the "whole number of persons in each State" that Section 2a(a) requires to be used as the apportionment base.

As Defendants implicitly concede, it follows that Plaintiffs are entitled to summary judgment on their statutory claims pursuant to the *ultra vires* doctrine, a cause of action that "is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The doctrine provides that "[w]hen an executive acts *ultra vires*," as is the case here, "courts are normally available to reestablish the limits on his authority." *Reich*, 74 F.3d at 1328; *see also Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all [executive branch] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("Courts remain obligated to determine whether statutory restrictions have been violated."). In light of that conclusion, we need not and do not reach Plaintiffs' constitutional claims, let alone the Plaintiffs' claims that did not form the basis

for their motion. Thus, Defendants' motion to dismiss those claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure is moot.

REMEDIES

Having granted Plaintiffs summary judgment on their statutory claims, we turn to the issue of remedies. Plaintiffs seek a permanent injunction prohibiting all Defendants — including the President himself — from implementing the Presidential Memorandum and a declaratory judgment that the Presidential Memorandum is unlawful. *See* Gov't Pls.' Compl. 44-45; NGO Pls.' Compl. 88-89.

A. Injunctive Relief

It is well established that plaintiffs "seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, they must show: (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiffs and defendants, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *See id.* But because "the government's interest is the public interest," where, as here, the government is a party, the last two factors merge. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs easily satisfy each factor and, thus, are entitled to an injunction. First and foremost, as discussed above, the census-related harms that Plaintiffs have demonstrated would be irreparable absent an injunction. That is, because there are no census do-overs, there would be no way to remedy them after the fact. And even if there were a way to correct for them after the fact, the harms, by their nature, are difficult, if not impossible, to measure. *See, e.g.*, *Salinger*

v. Colting, 607 F.3d 68, 81 (2d Cir. 2010) ("Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure . . . ."). Making matters worse, the harms caused by an inaccurate census would be felt for at least a decade, until the 2030 decennial census — if not longer. *See, e.g.*, Baldwin Decl. ¶ 25 (explaining that because the State of Washington relies on thirty-year population forecasts, which requires "an indicator that goes back in time as far as you are forecasting forward in time," the "2020 census data will be used in forecasting until at least the 2050 census data is available, and probably longer"). For much the same reason, the remedies available at law would plainly be inadequate. *See, e.g.*, *New York v. Dep't of Commerce*, 351 F. Supp. 3d at 675 (issuing an injunction and finding that "the degradation of information . . . would be irreparable, without any adequate remedy at law").

Finally, the balance of the hardships and the public interest both favor an injunction. Indeed, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal quotation marks and citation omitted). Moreover, both the Supreme Court's decision in *Department of Commerce v. House of Representatives* — affirming the Eastern District of Virginia's permanent injunction against the use of statistical sampling to enumerate the population in the 2000 census — and the Second Circuit's holding in *Carey* — affirming a preliminary injunction requiring the Census Bureau to process certain forms and to compare its list of New York City residents against other government records — confirm that the public interest favors an injunction in these cases. *See House of Representatives*, 525 U.S. at 344; *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980).

As the Second Circuit noted in *Carey*, "the public interest . . . requires obedience . . . to the requirement that Congress be fairly apportioned, based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data." *Id.*

Defendants' sole claim of hardship is that an injunction would "interfere with the Bureau's ongoing process by hindering agency efforts to refine its policies and to apply its expertise." Defs.' Reply 2 (internal quotation marks and alterations omitted).[19] They do not elaborate further, but it is plain that they are not referring to the operations of the census itself because, as noted above, they repeatedly concede that the Presidential Memorandum does "not in any way affect the conduct of the actual census." *Id.* Thus, Defendants must be referring to the Census Bureau's ongoing efforts to figure out how, if at all, to implement the President's directive in the Presidential Memorandum in time to meet the statutory deadline for the Secretary's report to the President. *See* 13 U.S.C. § 141(b). But it is against the public interest to comply with an unlawful directive. And any suggestion that, in the event our decision is reversed on appeal, granting an injunction would hinder the Census Bureau's efforts to comply with the Presidential Memorandum by the deadline are undermined by Defendants' repeated

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[19] Referencing a point they made in passing in a footnote in their opening brief, Defendants also argue for the first time in their reply that an injunction prohibiting the Secretary from transmitting information would violate the Opinions Clause of the Constitution, *see* Defs.' Reply 11 (citing Defs.' Mem. 42 n.17), which empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. 2, § 2, cl. 1. A party may not raise an argument in a footnote or for the first time in reply, so we deem the argument to be waived. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived . . . ."); *Levine v. Lawrence*, No. 03-CV-1694 (DRH) (ETB), 2005 WL 1412143, at *5 (E.D.N.Y. June 15, 2005) ("[F]ailure to adequately brief an argument constitutes waiver of that argument . . . ."). In any event, ensuring that the Secretary complies with the mandates of Section 141(b) — and, by extension, that the President complies with the mandates of Section 2a(a) — does not run afoul of the Opinions Clause.

assertions that "an erroneous or invalid apportionment number can be remedied after the fact." Defs.' Mem. 48. Finally, any such hardship to Defendants can be mitigated, if not eliminated, by crafting the injunction — as we do below — to bar only the inclusion in the Secretary's Section 141 report of data concerning the number of illegal aliens in each State and to allow the Census Bureau to continue its research efforts.

Thus, a permanent injunction is warranted. In an exercise of our discretion, however, we grant injunctive relief against all Defendants other than the President. The parties vigorously dispute whether and under what circumstances a federal court can grant injunctive relief against the President. *Compare* Defs.' Mem. 44-45, *and* Defs.' Reply 14-15, *with* Pls.' Reply 27 & n.13. At a minimum, however, it is plain that the "grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows." *Franklin*, 505 U.S. at 802. Thus, "[a]s a matter of comity," if nothing else, "courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President." *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) (per curiam). That is particularly true where the court can grant complete relief without enjoining the President, as is the case here. *See, e.g.*, *Franklin*, 505 U.S. at 802 ("[W]e need not decide whether injunctive relief against the President [i]s appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."); *accord Evans*, 536 U.S. at 463-64. In fact, if anything, the need to enjoin the President himself is even weaker here than it was in *Franklin* and *Evans*, which were litigated *after* the President had transmitted his apportionment statement to Congress. For the plaintiffs in those cases to obtain meaningful relief, therefore, the President himself would have needed to calculate a new apportionment figure and to then submit a new report to Congress. Here, by contrast, enjoining Defendants

other than the President (and granting a declaratory judgment, as discussed below) would provide Plaintiffs with complete relief, as the President cannot exclude illegal aliens from his apportionment calculations in his statement to Congress unless the Secretary gives him the relevant information in the Section 141 report.

Accordingly, the Court enjoins all Defendants other than the President from including in the Secretary's report to the President pursuant to Section 141(b) any "information permitting the President . . . to exercise the President's discretion to carry out the policy set forth in section 2" of the Presidential Memorandum — that is, any information concerning the number of aliens in each State "who are not in a lawful immigration status under the Immigration and Nationality Act." Presidential Memorandum, 85 Fed. Reg. at 44,680. Instead, consistent with the Census Act, the Secretary's Section 141(b) report shall include only "[t]he tabulation of total population by States under" Section 141(a) "as required for the apportionment of Representatives in Congress among the several States," 13 U.S.C. § 141(b) — that is, "information tabulated according to the methodology set forth in [the Residence Rule]," Presidential Memorandum, 85 Fed. Reg. at 44,680.[20] To be clear, as an exercise of its discretion, the Court does *not* enjoin Defendants from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State. That ensures that in the event that a higher court disagrees

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[20] Separately, there is an active debate over the propriety of "nationwide" or "universal" injunctions. *See, e.g.*, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring); *see also* Memorandum from the Attorney General to Heads of Civil Litigating Components & United States Attorneys, U.S. Dep't of Justice, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download. That debate has no relevance to this case, for many of the same reasons that it had no relevance in the citizenship question litigation. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d at 677-78. Not surprisingly, therefore, Defendants do not even raise the issue.

with our ruling (prior to the Section 141(b) deadline), the Secretary will be able to comply with the Presidential Memorandum in a timely fashion.

B. Declaratory Relief

In addition, we grant Plaintiffs' request for declaratory relief. The Declaratory Judgment Act vests federal courts with discretion to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). In exercising that discretion, courts must consider (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (2) whether a judgment would finalize the controversy and offer relief from uncertainty; (3) whether the proposed remedy is being used merely for procedural fencing or a race to *res judicata*; (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (5) whether there is a better or more effective remedy. *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003). "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate," Fed. R. Civ. P. 57, and we may grant declaratory relief "whether or not further relief is or could be sought," 28 U.S.C. § 2201(a); *see also Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("[A] request for declaratory relief may be considered independently of whether other forms of relief are appropriate.").

In our view, a declaration that the Presidential Memorandum is unlawful "would serve a useful purpose here, settle the legal issues involved, finalize the controversy, and offer [Plaintiffs] relief from uncertainty." *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 105 (2d Cir. 2012). Indeed, an unambiguous declaration

that the Presidential Memorandum is unlawful because the President does not have the authority to exclude illegal aliens from the apportionment base would serve the further useful purpose of "reasurr[ing] people they will be counted for the purpose of determining . . . congressional seats and electoral votes," Espinosa Supp. Decl. ¶ 8, thereby directly addressing the chilling effect on census participation that the Memorandum has caused. *Cf. Foretich v. United States*, 351 F.3d 1198, 1215 (D.C. Cir. 2003) ("[A] declaration will remove the imprimatur of government authority from [the illegal a]ct . . . ."). Such a declaration is particularly useful given that, for the reasons we discussed above, we decline to enjoin Defendants from taking steps to research whether or how the Presidential Memorandum could be implemented. That is, an unambiguous judicial declaration that the Presidential Memorandum is unlawful would help ensure that the chilling effects on participation in the census are mitigated to the maximum extent possible.

CONCLUSION

There is no dispute that the President has "accustomed supervisory powers over his executive officers," *Franklin*, 505 U.S. at 800, and thus retains some discretion in the conduct of the decennial census and resulting apportionment calculation. Nevertheless, where the authority of the President (or other members of the Executive Branch) to act is derived from statutes passed by Congress, the President must act in accordance with, and within the boundaries of, the authority that Congress has granted. For the reasons discussed above, we conclude that the President did not do so here and that the Presidential Memorandum is an *ultra vires* violation of Congress's delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141. Accordingly, Plaintiffs' motion for summary judgment with respect to their statutory *ultra vires* claims is

GRANTED, Defendants (other than the President) are ENJOINED as set forth above, and the Presidential Memorandum is DECLARED unlawful. We need not and do not reach the merits of Plaintiffs' other claims and need not address their request, in the alternative, for a preliminary injunction. Finally, Defendants' motion to dismiss for lack of jurisdiction is DENIED and their motion to dismiss for failure to state a claim is DENIED as moot.[21]

The Clerk of Court is directed to terminate ECF Nos. 74 and 117 and to close this case.

SO ORDERED.

Dated: September 10, 2020
New York, New York

_____/s/_____
RICHARD C. WESLEY
United States Circuit Judge

_____/s/_____
PETER W. HALL
United States Circuit Judge

_____/s/_____
JESSE M. FURMAN
United States District Judge

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[21] We believe that this matter was properly heard by a three-judge panel for the reasons set forth in Judge Furman's request to then-Chief Judge Katzmann for the appointment of such a panel. *See* ECF No. 68. Nevertheless, mindful that the issue is not clear-cut and that the Second Circuit has determined that it is jurisdictional, *see Kalson v. Paterson*, 542 F.3d 281, 286-87 (2d Cir. 2008), we follow the lead of prior three-judge panels by certifying that Judge Furman, to whom these cases were originally assigned, individually arrived at the same conclusions that we have reached collectively. *See Swift & Co. v. Wickham*, 382 U.S. 111, 114 n.4 (1965) (noting with approval that "[t]his procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before" (citing *Query v. United States*, 316 U.S. 486 (1942))); *FAIR v. Klutznick*, 486 F. Supp. at 578 (three-judge court) ("District Judge Gasch additionally certifies that he individually arrived at the same conclusion that we collectively reached . . . out of abundant caution, so that in the event we are mistaken, an appeal can still be expeditiously taken in the appropriate forum." (internal quotation marks and citation omitted)); *cf. Massachusetts v. Mosbacher*, 785 F. Supp. 230, 238 n.6 (D. Mass.) (three-judge court) ("Because the author of this opinion is the single district judge to whom this case was initially assigned, this opinion stands as certification that the author has individually arrived at the conclusions expressed collectively in the opinion and the judgment of this three-judge court."), *rev'd on other grounds sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5770 (JMF)
NEW YORK IMMIGRATION COALITION, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 20 Civ. 5781 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs—a group of states and localities ("Government Plaintiffs") and a group of non-profit organizations ("NGO Plaintiffs")—bring constitutional and statutory challenges to a memorandum that the President issued on July 21, 2020, entitled Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (the "Presidential Memorandum" or "Memorandum"), 85 Fed. Reg. 44,679 (July 23, 2020). That Memorandum provides that for purposes of reapportionment of Representatives in Congress following the 2020 census, "it is the policy of the United States to exclude" illegal aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id.* at 44,680. It directs the Secretary of Commerce to submit to the President two tabulations in connection with the apportionment—one tabulation includes an enumeration according to the methodology set forth in the Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525 (Feb. 8, 2018) ("Residence Criteria"), and the second, "to the extent practicable," requires the Secretary to provide information permitting the President to exclude illegal aliens from the apportionment base. Because Plaintiffs' various challenges to this Memorandum fail as a matter of law, they should be dismissed.

As a threshold matter, this Court lacks subject-matter jurisdiction over Plaintiffs' claims both because the claims are not ripe and because Plaintiffs lack standing to challenge the Presidential Memorandum. Plaintiffs' alleged injuries, including lost representation in Congress, decreased federal funding, and diversion of resources, are speculative. At this point it is unknown what numbers the Secretary of Commerce will provide the President. Accordingly, any allegation as to the impact of the President's apportionment decision on matters such as congressional representation or federal funding is wholly theoretical and legally insufficient to meet the ripeness and standing requirements.

Plaintiffs' allegations that the Presidential Memorandum will have a significant chilling effect on immigrant communities' participation in the census likewise are speculative and conclusory. They are also based on hearsay. Plaintiffs rely on affidavits from fact and expert witnesses that contain only generalized, second- or third-hand accounts of alleged harm and unsubstantiated conjectures. The

Court should therefore dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(1) for lack of ripeness and standing.

In addition to these jurisdictional defects, Plaintiffs' claims are subject to dismissal for failure to state a claim pursuant to Rule 12(b)(6). Plaintiffs assert that the Presidential Memorandum violates the Administrative Procedure Act ("APA"), the constitutional separation of powers, the Tenth Amendment, principles of equal protection under the Fifth and Fourteenth Amendments, the Apportionment Clauses of Article I and the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a. Each of these claims fails as a matter of law.

First, there is no viable basis for APA review of the Presidential Memorandum—both because the President is not an "agency" under the APA and because Plaintiffs fail to allege any "final agency action" by the Secretary of Commerce. Second, to the extent the NGO Plaintiffs allege that the Presidential Memorandum contravenes the separation of powers, that claim fails because the Supreme Court in *Franklin v. Massachusetts* expressly recognized the broad scope of congressional delegation of authority to the President in relation to apportionment. 505 U.S. 788, 799 (1992). Third, the claim that the Presidential Memorandum amounts to "coercion" or "punish[ment]" in violation of the Tenth Amendment must be dismissed because Plaintiffs have offered only conclusory allegations as to the Memorandum's supposedly invidious purpose and have not alleged any commandeering of state resources. Fourth, Plaintiffs' equal protection claims fail because they rely on misleading characterizations of the Presidential Memorandum and because Plaintiffs fail to plausibly allege "animus" or "discriminatory intent." Fifth, Plaintiffs' claims under the Apportionment Clauses, 13 U.S.C. § 141, and 2 U.S.C. § 2a, are legally deficient, because they are inconsistent with the Executive Branch's longstanding discretion to define who qualifies as "inhabitants" (or "persons in each State") for purposes of apportionment. Finally, insofar as Plaintiffs seek an injunction against the President, such relief is precluded by Supreme Court precedents barring judicial intrusion on the President's exercise of policy-making discretion.

For the same reasons that their Complaints must be dismissed, Plaintiffs are not entitled to either partial summary judgment or a preliminary injunction. Plaintiffs cannot succeed on their claims

both because of threshold jurisdictional flaws, but also because their claims are meritless. And even if Plaintiffs had standing to bring these actions, which they do not, they have failed to plausibly assert a threat of imminent irreparable harm from the Memorandum. Accordingly, if the Court declines to grant Defendants' Motion to Dismiss, it should deny Plaintiffs' Motion for Partial Summary Judgment or Preliminary Injunction.

BACKGROUND

I. The Census and Apportionment Generally

The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To make apportionment possible, the Constitution requires that the federal government conduct a census every ten years in such a manner as directed by Congress. *Id.* art. I, § 2, cl. 3. Each State's number of Representatives, together with its two Senators, also determines the number of electors for President and Vice President in the Electoral College. *See id.* art. II, § 1, cl. 2.

Congress, in turn, has by law directed the Secretary of Commerce to conduct a census of the "total population" every 10 years "in such form and content as he may determine." 13 U.S.C. § 141(a) and (b). The Census Bureau assists the Secretary of Commerce in the performance of this responsibility. *See* 13 U.S.C. §§ 2, 4. For purposes of the 2020 census, the Census Bureau has announced that field data collection will end on September 30, 2020. *See* August 3, 2020, Statement from U.S. Census Bureau Director Steven Dillingham ("Director Dillingham"): Delivering a Complete and Accurate 2020 Census Count, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. According to Director Dillingham, the Census Bureau will take various actions, such as increasing training and providing awards to census takers who maximize the hours worked, to "improve the speed of [the] count without sacrificing completeness." *Id.* The Census Bureau "intends to meet a similar level of household responses as collected in prior censuses, including outreach to hard-to-count communities." *Id.*

The Census Bureau has promulgated criteria to count most people for census purposes "at their usual residence, which is the place where they live and sleep most of the time." Residence

Criteria, 83 Fed. Reg. at 5,533. Following completion of the 2020 census, by December 31, 2020, the Secretary of Commerce must submit to the President "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). "On the first day, or within one week thereafter, of the first regular session of the [117th Congress]," the President must "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled . . . by the method known as equal proportions." 2 U.S.C. § 2a(a).

II. The July 21, 2020, Presidential Memorandum

On July 21, 2020, the President issued a Memorandum to the Secretary of Commerce regarding the exclusion of illegal aliens from the apportionment base following the 2020 census. *See* 85 Fed. Reg. at 44,679-81. The Presidential Memorandum states that "it is the policy of the United States to exclude" such aliens from the apportionment base "to the extent feasible and to the maximum extent of the President's discretion under the law." *Id.* at 44,680. The Presidential Memorandum directs the Secretary of Commerce to submit to the President two tabulations. One is an enumeration "tabulated according to the methodology set forth in" the Residence Criteria. *Id.* The second calls for "information permitting the President, to the extent practicable," to carry out the stated policy, *i.e.*, an apportionment excluding illegal aliens. *Id.*

To date, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census, *see* Exec. Order 13880, 84 Fed. Reg. 33,821-25 (July 16, 2019), and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Dillingham Statement, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html ("The Census Bureau continues its work on meeting the requirements of Executive Order 13,880 issued July 11, 2019 and the Presidential Memorandum issued July 21, 2020. A team of experts [is] examining methodologies and options to be employed for this purpose. The collection and use of pertinent administrative data continues.").

III. Plaintiffs' Challenge

On July 24, 2020, the Government Plaintiffs and NGO Plaintiffs filed complaints challenging the Presidential Memorandum; they amended their complaints on August 3 and August 6, respectively. *See* ECF Nos. 34 ("Gov't Pls.' Am. Compl."), 62 ("NGO Pls.' Am. Compl."). Plaintiffs allege, among other things, that the Presidential Memorandum violates requirements contained in Article I, the Fourteenth Amendment, 13 U.S.C. § 141, and 2 U.S.C. § 2a to base apportionment on the "whole number of persons in each State"; the Fifth and Fourteenth Amendment's Due Process Clause's prohibition against unlawful discrimination; the Tenth Amendment by punishing states that refuse to assist in enforcement of federal immigration law; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706; separation of powers; and 13 U.S.C. §§ 141 and 195 with respect to the use of statistical sampling. Gov't Pls.' Am. Compl. ¶¶ 4-5, 142-74; NGO Pls.' Am. Compl. ¶¶ 1, 8, 11, 182-262.

Plaintiffs further allege that if the President excludes illegal aliens from the apportionment base, some Plaintiffs will be injured by losing one or more Representatives (and corresponding electors in the Electoral College), undermining their ability to conduct congressional and state-level redistricting, depriving them of federal funding, and degrading the quality of the census data on which Plaintiffs rely to perform government functions; the NGO Plaintiffs further allege loss of political power and diversion of resources to census outreach efforts "to combat fear and disinformation resulting from the Presidential Memorandum." Gov't Pls.' Am. Compl. ¶¶ 6, 117-127, 135-36; NGO Pls.' Am. Compl. ¶¶ 8, 21-83, 161-69. Plaintiffs assert that the Presidential Memorandum will reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe." Gov't Pls.' Am. Compl. ¶¶ 130, 132-34; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. Plaintiffs seek declaratory and injunctive relief. Gov't Pls.' Am. Compl. ¶¶ 7 & Prayer for Relief ¶¶ 1-9; NGO Pls.' Am. Compl. Request for Relief ¶¶ i-ix.

In support of their motion for partial summary judgment or a preliminary injunction (ECF No. 77), Plaintiffs submitted a declaration from Matthew Colangelo, an attorney representing the State of New York, which attached over 900 pages of documents, including three expert declarations and 51 fact witness declarations (ECF No. 76, "Colangelo Decl."). The expert reports come from (1)

Mathew A. Barreto, Ph.D., a political science professor, Colangelo Decl. Ex. 56 ("Barreto Decl."); (2) John Thompson, a former Director of the Census Bureau, Colangelo Decl. Ex. 57 ("Thompson Decl."); and (3) Christopher Warshaw, Ph.D., an assistant professor of political science, Colangelo Decl. Ex. 58. The 51 fact declarations, from various state and local governmental and non-governmental sources, forecast purported injuries that the Presidential Memorandum could inflict on aliens' participation in the remaining portion of the 2020 census. Colangelo Decl. Exs. 1-51.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs fail this straightforward standard, so summary judgment should be denied and this case should be dismissed.

I. The Court Lacks Jurisdiction Because Plaintiffs' Claims Are Unripe

"To be justiciable, a cause of action must be ripe—it must present 'a real, substantial controversy, not a mere hypothetical question.' . . . . A claim is not ripe if it depends upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013); *see also Texas v. United States*, 523 U.S. 296, 300 (1998). Ripeness incorporates both a constitutional requirement and a prudential requirement. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The ripeness doctrine "is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Laboratories*, 387 U.S. at 148-49).

The constitutional requirement "overlaps with the standing doctrine, 'most notably 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) (quoting *Ross v. Bank of Am., NA.,* 524 F.3d 217, 226 (2d Cir. 2008)). Under the ripeness doctrine, the Court also

considers: "(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.*, 523 U.S. at 733; *see also Nat'l Org. for Marriage*, 714 F.3d at 691 ("To determine whether to abstain from a case on prudential ripeness grounds, we proceed with a two-step inquiry, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (citation and internal quotation marks omitted)).

Here, Plaintiffs' claims do not meet the constitutional requirement for ripeness because the claims are, at bottom, about apportionment, rather than census procedures—and any alleged apportionment injury that States may, or may not, suffer is at this point "conjectural or hypothetical" rather than "imminent."

A. It Is Currently Unknown What Numbers the Secretary May Report to the President

The Presidential Memorandum states that "it is the policy of the United States to exclude" illegal aliens from the apportionment base "*to the extent feasible* and to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680 (emphasis added). It directs the Secretary of Commerce 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. *Id.* at 44,680 (emphasis added).

The extent to which it will be feasible for the Census Bureau to provide the Secretary of Commerce a second tabulation is, at this point, unknown. *See* Decl. of Dr. John M. Abowd ¶ 15. As Director Dillingham recently publicly stated, the Census Bureau is still evaluating the usability of administrative records pertaining to citizenship status in connection with the decennial census and formulating a methodology for potentially excluding illegal aliens. *See* August 3, 2020, Statement from Director Steven Dillingham, available https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. Indeed, Plaintiffs themselves repeatedly

allege that the Census Bureau is currently unable to comply with the Presidential Memorandum's directive for an enumeration excluding illegal aliens. *See, e.g.*, NGO Pls.' Am. Compl. ¶ 176 ("The Census Bureau . . . does not currently have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction."); Gov't Pls.' Am. Compl. Sec. VI & ¶ 137 ("Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants," noting that "[j]ust months ago, the Federal Government represented . . . that there is a 'lack of accurate estimates of the resident undocumented population' on a state-by-state basis."), ¶ 138 (administrative records do not provide accurate information about the number of undocumented immigrants), ¶ 140 ("[T]he Census Bureau has not yet 'formulated a methodology' to estimate the undocumented population"); *see also generally* Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41 & NGO Pls.' Am. Compl. ¶¶ 175-79 (containing similar allegations and citing statements by the federal government in support).[1]

Because it is not known what the Secretary may ultimately transmit to the President, it is necessarily not yet known whether the President will be able to exclude some or all illegal aliens from the apportionment base. As a result, Plaintiffs' apportionment claims are unripe as they depend upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Nat'l Org. for Marriage, Inc.*, 714 F.3d at 687. Put simply, until the Census Bureau and Secretary of Commerce transmit the information specified in the Presidential Memorandum, and until the President acts on the information, any claim of apportionment injury is speculative.

B. Other Considerations Underscore that Plaintiffs' Claims Are Not Ripe

Given that the effects of the Presidential Memorandum and any apportionment injuries to Plaintiffs are at this point unknown, other considerations, such as the hardship to the parties and the fitness of the issues for judicial consideration, also counsel against the Court's exercise of jurisdiction.

[1] The specific claim brought by the NGO Plaintiffs pursuant to 13 U.S.C. §§ 141, 195—alleging that the Census Bureau will impermissibly rely on sampling to enumerate the illegal alien population (NGO Pls.' Am. Compl. ¶¶ 251-62)—is similarly unripe because it is conjectural and hypothetical. Plaintiffs have provided nothing other than speculation that the Census Bureau will rely on sampling. Gov't Pls.' Am. Compl. Sec. ¶¶ 137-41; NGO Pls.' Am. Compl. ¶¶ 175-79.

Nat'l Org. for Marriage, Inc., 714 F.3d at 691. For example, given the above-discussed uncertainties with respect to the effects of the Presidential Memorandum, delayed review would not cause undue hardship to Plaintiffs. *See, e.g.*, *Ohio Forestry Ass'n*, 523 U.S. at 733-34 (challenge to agency action unripe where there is no "significant practical harm" at the present time because a number of future actions would need to occur to make the harm more "imminent" and "certain"); *Texas*, 523 U.S. at 300, 302 (claim unripe where a number of actions would need to occur to cause the alleged harm, rendering it "too speculative whether the problem . . . will ever need solving"); *Simmonds v. INS*, 326 F.3d 351, 360 (2d Cir. 2003) ("The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship."). Further, judicial review would improperly interfere with the census, which is currently in progress, and could impede the apportionment, which has not yet occurred. *See, e.g.*, *Ohio Forestry Ass'n, Inc.*, 523 U.S. at 735 (action unripe where judicial review "could hinder agency efforts to refine its policies"). Finally, the Court would benefit from further real-world factual development. *See, e.g.*, *id.* at 736 (action was unripe where it would require court to engage in "time-consuming judicial consideration . . . of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways," involved issues that could change in the future, and "depending upon the agency's future actions . . . review now may turn out to have been unnecessary"). The actual tabulations that are called for by the Memorandum must be reported by no later than the end of this year, assuming the statutory deadlines in § 141 and § 2a are not extended by Congress.

Perhaps unsurprisingly, census and apportionment cases generally are decided post-apportionment, when census enumeration procedures are no longer at issue and the actual apportionment figures are known. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 79-91 (1992) (challenging allocation of Department of Defense's overseas employees to particular states following census); *Dep't of Commerce v. Montana*, 503 U.S. at 445-46 (challenging method of equal proportions to determine representatives); *Utah v. Evans*, 536 U.S. 452, 458-59 (2002) (challenging sampling method known as "hot-deck imputation" used by Census Bureau after analyzing census figures); *Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996) (challenging decision not to use particular statistical adjustment

to correct an undercount). Here, Plaintiffs are not challenging the enumeration procedures themselves, but only the hypothetical apportionment that might result from actions that might be taken pursuant to the Presidential Memorandum. *See, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 142-46; NGO Pls.' Am. Compl. ¶¶ 184-93. Consistent with this long line of Supreme Court precedent, such a challenge should await the actual apportionment.

II. This Court Lacks Jurisdiction Because Plaintiffs Lack Standing

For similar reasons, Plaintiffs lack standing to pursue their claims. The doctrine of standing requires a plaintiff to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and defendants' challenged conduct, such that the injury is "fairly traceable to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defs. of Wildlife*, 504 U.S. at 560-61. The standing inquiry is "'especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). Plaintiffs bear the burden of establishing the required elements of standing. *Defs. of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.*, but "a plaintiff cannot rely solely on conclusory allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Here, none of the injuries Plaintiffs allege satisfy these requirements.

A. Plaintiffs' Alleged Apportionment Injuries Are Too Speculative to Confer Standing

The standing requirement of "injury in fact" requires an allegation that "the plaintiff 'has sustained or is immediately in danger of sustaining a direct injury'" as a result of the challenged action. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (citations omitted). The injury or threat of injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Defs. of Wildlife*, 504 U.S. at 560. Thus, an alleged future injury must be "'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*, 568 U.S. at 409 n.5). "'Allegations of possible future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As discussed above, *see supra* at 7-10, Plaintiffs' alleged apportionment injuries are speculative and conclusory, and at this point in time, there is no "substantial risk" that harm will occur. *See Susan B. Anthony List*, 573 U.S. at 158. In fact, Plaintiffs' own allegations that the Census Bureau has not yet "formulated a methodology" for excluding all illegal aliens contradicts their alleged harm. *See supra* at 8. Therefore, any injury to Plaintiffs—be it in the form of loss of a Representative, loss of funding, or otherwise—is conjectural or hypothetical. *Defs. of Wildlife*, 504 U.S. at 560.

B. Plaintiffs' Allegations That the Presidential Memorandum Will Reduce Participation in the 2020 Census Are Also Speculative, Not Traceable to the Memorandum, and Not Redressable by a Favorable Ruling

Plaintiffs alternatively allege that they will suffer injury because the Presidential Memorandum will purportedly reduce the number of aliens who participate in the census by making them think that their responses are less valuable and causing "fears . . . that their data will not be safe," thereby affecting the distribution of federal funds and degrading the quality of census data. Gov't Pls.' Am. Compl. ¶¶ 130, 132-36; NGO Pls.' Am. Compl. ¶¶ 9, 170-74. However, these alleged injuries are far too speculative to establish standing. In addition, those injuries are neither traceable to the Memorandum nor redressable by a favorable ruling from this Court.

1. Plaintiffs' Alleged Enumeration Injuries Are Too Speculative to Confer Standing

As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census itself[;] [i]nstead, it relates to the calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF No. 68 at 2. There is, facially, no reason why such a Memorandum should have any effect on census response rates. To the contrary, as explained by the Census Bureau's Associate Director for Decennial Census Programs, Albert E. Fontenot, Jr., the Census Bureau's enumeration is almost complete, and the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations or "the Census Bureau's commitment to count each person in their usual place of residence." Decl. of Albert E. Fontenot, Jr. ¶¶ 7, 12. And although Plaintiffs submit a variety of declarations to purportedly bolster their claims that the Memorandum has a chilling effect on respondents,[2] those declarations are impermissibly conjectural, conclusory, and hearsay.

For example, Dr. Barreto's declaration provides an opinion regarding the so-called "chilling effect" of the Memorandum on individuals' participation in the 2020 Census that is based on multiple levels of conjecture. Dr. Barreto cites several Spanish-language news sources as providing hearsay statements that activists and organizations are concerned about the Memorandum causing fear in Hispanic and immigrant communities; that several studies have found that immigrant communities will rely on Spanish-language news sources; and that various studies, many of them from decades ago, suggest that response rates are affected by the overall socio-political environment. Barreto Decl. ¶¶ 15-16, 32-38. This "evidence" is insufficient to support Plaintiffs' allegations that the Memorandum will significantly reduce the number of aliens who participate in the census so as to materially affect

[2] A court "'may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits.'" *New York v. Dep't of Commerce*, 315 F. Supp. 3d 766, 780 (S.D.N.Y. 2018) (Furman, J.) (alteration in original) (quoting *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004)); *see also Broidy Capital Mgmt., LLC v. Benomar*, 944 F.3d 436, 441 (2d Cir. 2019) ("The district court can refer to evidence outside the pleadings when resolving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)."

federal funding and degrade the quality of census data. Although Dr. Barreto discusses studies reflecting concerns among aliens about citizenship information in the census generally and a citizenship question on the census specifically (*see, e.g.*, Barreto Decl. ¶¶ 24-25, 54-55, 61, 68), this is far attenuated from the issues in this case, which involves the Presidential Memorandum. This case does not involve a citizenship question on the census questionnaire or a change to the Census Bureau's enumeration under the Residence Criteria.

Tellingly, Dr. Barreto cites no study actually addressing the Presidential Memorandum's effect on the 2020 Census. And Dr. Barreto's discussion of citizenship-question studies is grounded in inaccuracies. Notably, Dr. Barreto fails to address, or even acknowledge, the shortcomings that this Court identified in the very study Dr. Barreto now cites for the proposition that the placement of a citizenship question on a census questionnaire would depress response rates. *Compare* Barreto Decl. ¶ 68 *with New York v. Department of Commerce*, 351 F. Supp. 3d 502, 581 n.36 (S.D.N.Y. 2019) (noting that the Court would place "only limited weight on Dr. Barreto's study" because it had a flawed design, and did not weigh the resulting data "to match the population totals").

Further, Dr. Barreto fails to consider the results of the randomized controlled trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation, which found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). That study contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl. ¶ 13. Overall, "[t]he test questionnaire with the citizenship question had a self-response rate of 51.5 percent; [while] the test questionnaire without the citizenship question had a self-response rate of 52.0 percent." Census Test Report at ix. And while some narrow subgroups exhibited statistically-significant lower self-response rates, *id.* at x, the Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup differences seen in this test."

Id. *See generally* Abowd Decl. ¶ 13. As Dr. Abowd reports, this new finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Mr. Thompson's expert declaration—expressing the subjective opinion that he is "extremely concerned" that the Presidential Memorandum will significantly increase the risk of undercounting immigrant communities—also cannot establish standing. Mr. Thompson's citation of studies conducted in planning for the 2020 Census that generally indicate immigrants' fear of the government and their concern about responses being used against them, and a 2018 study that he claims supports that a citizenship question would reduce response rates, again, have little bearing on this case. Despite discussing these studies, Mr. Thompson's declaration likewise does not address the June 2019 randomized controlled trial showing no statistically significant difference in response rates with and without a citizenship question. *See* Abowd Decl. ¶ 13. Nor do the studies Mr. Thompson cites—which have nothing to do with the Presidential Memorandum—support a significant chilling effect from the Presidential Memorandum.

Likewise, the statements contained in various fact witness declarations that the Presidential Memorandum will have a chilling effect on participation of immigrants in the 2020 census also offer nothing more than speculative, conclusory statements and hearsay. For example, many of the declarations provide no support whatsoever for their assertions. *See, e.g.*, Colangelo Decl. Exs. 9 ¶ 9-12; Ex. 11 ¶ 11; Ex. 12 ¶ 8-9; Ex. 16 ¶¶ 8-12; Ex. 22 ¶ 8; Ex. 26 ¶¶ 11-13; Ex. 33 ¶¶ 7-8; Ex. 38 ¶¶ 7-9; Ex. 41 ¶¶ 8-12; Ex. 47 ¶¶ 2, 13, 20. Other declarations vaguely reference that they heard from "community partners," "Census advocates," and the like that the Presidential Memorandum was decreasing participation among immigrants. *See, e.g.*, Colangelo Decl. Exs. 1 ¶ 10; Ex. 4 ¶¶ 8-9; Ex. 5 ¶ 5; Ex. 10 ¶ 6; Ex. 14 ¶¶ 15-19; Ex. 30 ¶¶ 9-10; Ex. 35 ¶¶ 5-7; Ex. 36 ¶¶ 10-14; Ex. 42 ¶¶ 5, 7; Ex. 43 ¶¶ 12-16; Ex. 44 ¶¶ 13, 17, 21-22; Ex. 51 ¶ 7. Very few of these declarations provide any examples to support their allegations, and the few that do, are vague and based on hearsay. *See, e.g.*, Colangelo Decl. Exs. 17 ¶¶ 6-9; Ex. 18 ¶¶ 10-13; Ex. 34 ¶¶ 8-10; Ex. 45 ¶¶ 11-12. They certainly do not provide sufficient support that the Presidential Memorandum would have an appreciable effect on the

participation of illegal aliens in the remaining months of the 2020 census—for which field operations are to be completed by September 30, 2020.

Simply put, Plaintiffs' alleged injuries all depend on (i) the assumption that a significant percentage of illegal aliens who otherwise would have participated in the census will be deterred from doing so despite outreach by the Census Bureau, and that (ii) the belief this lack of participation will materially degrade the census data which will (iii) result in an appreciable effect on apportionment, redistricting, and funding. Plaintiffs fail to allege sufficient facts that the above sequence of events will occur with any likelihood. *See supra* at 12-14.

2. The Alleged Chilling Effect Is Not Traceable to the Memorandum

Separate from the question of injury, the materials submitted by Plaintiffs fail to show that any diminution in census response rates is fairly traceable to the Memorandum. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 03 (1998) (for plaintiff to establish standing "there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"). To satisfy the "'traceability'" or "'causation'" prong of the Article III standing test, allegations must provide more than "'unadorned speculation'" to "'connect their injury to the challenged actions.'" *CREW v. Trump*, 953 F.3d 178, 191 (2d Cir. 2020) (quoting *Simon v. Eastern Kentucky Welf. Rights. Org.*, 426 U.S. 26, 44-45 (1976)), *reh'g en banc denied*, 2020 WL 4745067 (Aug. 17, 2020). The allegations of fact must plausibly support a "substantial likelihood" that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions (and that prospective relief could mitigate the harm). *Id.* Where a theory of injury rests on a "highly attenuated chain of possibilities," *Clapper v. Amnesty Int'l*, 568 U.S. 398, 410 (2013), "speculation regarding the future actions of third parties is not sufficient to establish an imminent injury, *Lower East Side People's Credit Union v. Trump*, 289 F. Supp. 3d 568, 580 (S.D.N.Y 2018); *see also Taylor v. Bernanke*, No. 13-CV-1013 (ARR), 2013 WL 4811222, at *6 (E.D.N.Y. Sept. 9, 2013) ("Where the occurrence of the future injury depends on the actions of a third party not included in the plaintiff's suit, the Supreme Court has shown particular reluctance to conclude that the 'imminence' requirement is met."); *Himber v. Intuit,*

Inc., No. 10-CV-2511 (JFB), 2012 WL 4442796, at *7 (E.D.N.Y. Sept. 25, 2012) ("As the jurisprudence of the Supreme Court and Second Circuit has clearly articulated, claims of harm based upon speculation regarding decisions by third parties is insufficient to confer Article III standing.").

Here, as noted above, the primary basis for linking the Memorandum to response rates comes from Plaintiffs' expert Dr. Barreto. He opines that immigrant communities are less likely to respond to the census after the Memorandum because (1) immigrant communities' trust in the government and willingness to share information was undermined, Barreto Decl. ¶¶ 14, 19, by; (2) third-party reports featuring "immigrants, as well as individuals who worked with community-based organizations that serve immigrants, and even journalists, all stat[ing] that they believed the July 21 Memorandum was an effort to sow confusion and distrust, and to reduce the count of Latinos and immigrants on the 2020 Census," Barreto Decl. ¶¶ 33, 15; carried on (3) various media sources, particularly Spanish-language ones, which are highly influential in the immigrant and Latino communities, Barreto Decl. ¶¶ 16, 32. Dr. Barreto posits this chain as an unbroken line. But the media, and the community activists they feature, are independent actors; those entities' messages about the Memorandum are the product of their own interpretations and views, many of which are at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18, ECF No. 76.47 (stating that CASA de Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear").

It makes little sense for Plaintiffs to attribute whatever harm is caused by those independent actors to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the "risk of [individuals'] information being linked to immigration records and [those individuals] facing immigration enforcement." Barreto Decl. ¶ 62, Pls.' Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Simply put, any contention or concern that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is contrary to established statutory

provisions mandating strict confidentiality for census responses. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information). Indeed, the Census Bureau devotes resources to educating the public about the privacy and confidentiality of census responses specifically to allay such fears of adverse use. *See, e.g.*, *Data Protection and Privacy Program*, Census Bureau, available at https://www.census.gov/about/policies/privacy.html (last visited August 17, 2020); Fontenot Decl. ¶ 10. Because nothing in the Memorandum undermines these statutory protections, it is unreasonable to trace fear of immigration enforcement to the Memorandum itself, rather than to the messages conveyed by other actors in Plaintiffs' chain of causation. *See, e.g.*, Barreto Decl. ¶ 46 (noting that immigrants "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)); *see also supra* at 4.

The presence of such independent sources distinguishes this case from the litigation over the placement of a citizenship question on the census form, in which both this Court and the Supreme Court found that the placement of such a question could predictably cause lower self-response rates among certain communities. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). That case presented a situation not found here: namely, the direct collection of information from respondents. The Memorandum is not itself directed at census respondents and appears, even in Plaintiffs' telling, to be filtered to them through third-party intermediary sources. How those sources interpret the Memorandum should not be dispositive of the Memorandum's effects. Put another way, the alleged injuries here depend on "a chain of causation" with multiple "discrete links, each of which 'rest[s] on [the plaintiffs'] highly speculative fear that governmental actors" would exercise their "discretion in a [] way" that would adversely affect Plaintiffs. *See Dep't of Commerce*, 315 F. Supp. 3d at 787 (summarizing *Clapper*, 568 U.S. at 410-14, and distinguishing citizenship question case from *Clapper* partly on this basis). Such a speculative chain of causation is insufficient to establish standing.

3. A Favorable Ruling Would Not Redress Plaintiffs' Alleged Enumeration Injuries

Finally, even if Plaintiffs could establish the existence of a "chilling" effect traceable to the Memorandum, they still fail to establish the last prong of standing: namely, that the effect would be cured by a favorable ruling from this Court. The redressability requirement "lies at the core of the standing doctrine" because "[a]n abstract decision without remedial consequence seems merely advisory, an unnecessary expenditure of judicial resources that burdens the adversary and carries all the traditional risks of making bad law and trespassing on the provinces of the executive and legislature." *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014); *see also Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Where a plaintiff requests prospective relief in the form of a declaratory judgment or injunction, the plaintiff must show that "prospective relief will remove the harm" and the plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin,* 422 U.S. 490, 505, 508 (1975). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

Here, it is entirely speculative that there are enough aliens who, while currently deterred from participating in the census, would *decide* to participate if this Court granted Plaintiffs relief. Indeed, nothing that Plaintiffs have submitted speaks to this issue with any particularity. The closest Plaintiffs come to attempting this showing is Dr. Barreto's report discussing research studies from 2018 that endeavored to predict how the removal of a citizenship question from the census questionnaire would affect response rates. Barreto Decl. ¶¶ 68–69. But, as noted above, those studies are inconsistent with the large, and statistically rigorous, study published in 2020 by the Census Bureau, which showed no statistically-significant diminution of response rates in the first instance. Abowd Decl. ¶¶ 13, 17. Further, there is no reason to expect the Memorandum, which asks nothing of respondents, to have a significant effect on response rates—and even less reason to expect that any people deterred from responding to the census would change their mind if the Memorandum were enjoined, especially since

the census would conclude long before any such injunction would become final on appeal. *See supra* at 4.

If anything, the declarations proffered by Plaintiffs tend to paint the opposite picture. The declarations repeatedly lament an alleged "macro environment" of mistrust around immigration. Thompson Decl. ¶¶ 19–20; *see also* Barreto Decl. ¶ 46. It is hard to imagine that precluding the Secretary from complying with a Memorandum that does not implicate immigration enforcement or change census operations would alter the kind of mistrust that Plaintiffs allege to be in effect currently.

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The Supreme Court has emphasized that standing is not an "ingenious academic exercise in the conceivable." *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). Plaintiffs cannot "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Clapper*, 568 U.S. at 419. Rather, Plaintiffs can establish standing only by shouldering the substantial burden of establishing that the Court, in a real way, can remedy an injury Plaintiffs have suffered as a result of some action Defendants took. *Id.* Because Plaintiffs have failed to make that showing here, their complaint should be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs Fail to State a Claim

Even if the Court concludes that it has subject-matter jurisdiction over Plaintiffs' claims, Plaintiffs' failure to adequately plead any claim serves as an independent additional basis for the Court to dismiss these consolidated actions.

A. *Franklin* Mandates Dismissal of Plaintiffs' APA Claims

Plaintiffs seek APA review of both the President's policy directives in the Presidential Memorandum and steps that the Secretary of Commerce may have taken to prepare and transmit a set of "total population numbers for each state that exclude undocumented immigrants . . . to the President" in accordance with the Presidential Memorandum. *See* NGO Pls.' Am. Compl. ¶¶ 237-250 (asserting APA claim against "Defendants"); Gov't Pls.' Am. Compl. ¶¶ 159-163 (same). Their pleadings, however, challenge conduct by the President that is not subject to review under the APA

and, in any event, fail to identify any act that satisfies the "final agency action" standard set forth in *Franklin*, 505 U.S. at 796-801 (applying the definition of final agency action in 5 U.S.C. § 704 to the apportionment context); *see also State of Cal. v. Dep't of Justice*, 114 F.3d 1222, 1225 (D.C. Cir. 1997) ("No final administrative action, no judicial review"). Accordingly, Plaintiffs' APA claims should be dismissed.[3]

First, insofar as Plaintiffs seek review of the President's action under the APA, the law is clear that the APA does not provide a basis for such review. In *Franklin*, for example, the Supreme Court held that because "the APA does not expressly allow review of the President's actions," such "actions are not subject to [the APA's] requirements." 505 U.S. at 800; *accord Dalton*, *v. Specter*, 511 U.S. 462, 468 (1994); *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003) (recognizing that under *Franklin* and *Dalton*, "the APA does not allow courts to review the President's actions"). Accordingly, Plaintiffs' APA challenges to the Presidential Memorandum should be dismissed under Rule 12(b)(6).

Second, to the extent that Plaintiffs also seek APA review of a "directive" that they believe the Secretary of Commerce has given to "the Census Bureau to effectuate the [Memorandum's] policy of excluding undocumented immigrants from the census" as well as the report the Secretary of Commerce is expected to submit to the President in January 2021, *see* NGO Pls.' Am. Compl. ¶ 242, that claim fails as well because there is no final agency action. In *Franklin*, the Supreme Court directly confronted the question whether a "statutory basis [existed] … under the APA" for judicial review of the Secretary of Commerce's report to the President regarding the decennial census data under 13 U.S.C. § 141(b). *See* 505 U.S. at 796-800. The Court concluded that the Secretary's report to the President is "not final and therefore not subject to [APA] review" because it "serves more like a tentative recommendation than a final and binding determination." *Id.* at 798. More specifically, the Court identified two prerequisites for an agency action to be deemed "final" for APA purposes — *one*,

[3] The Second Circuit has left open the question whether a plaintiff's threshold failure to identify a "final agency action" requires dismissal under Rule 12(b)(6) or Rule 12(b)(1). *Compare Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA . . . requirement of finality is jurisdictional"); *with Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (suggesting that whether the "threshold requirements" of APA review are satisfied may be analyzed under Rule 12(b)(6) instead of 12(b)(1)).

that "the agency has completed its decisionmaking process," and, *two*, that "the result of that process is one that will directly affect the parties." *Id.* at 797.

Here, both the alleged directive from the Secretary of Commerce and his submission of a report to the President are the acts "of a subordinate official" preceding "the final action" to be taken the President. *See Franklin*, 505 U.S. at 796-97. Neither type of action by the Secretary of Commerce, therefore, is "final agency action" subject to review under the APA. *See id.* at 797.[4]

B. The Government Plaintiffs Have Failed to Plausibly Plead That the Presidential Memorandum Amounts to "Coercion" in Violation of the Tenth Amendment

The Government Plaintiffs also have failed to plead a viable Tenth Amendment Claim. The Tenth Amendment "reserve[s] to the states [] or to the people" those "powers not delegated to the [federal government] by the Constitution" or "prohibited by it to the states." The Government Plaintiffs conclusorily assert that Defendants have violated the Tenth Amendment because the Presidential Memorandum "punishes" Plaintiffs "for refusing to assist in the enforcement of federal immigration laws, in an attempt to coerce plaintiffs to change their policies." Gov't Pls.' Am. Compl. ¶ 155.

Plaintiffs' Tenth Amendment claim appears to derive from the "anti-commandeering" doctrine articulated by the Supreme Court. *See generally New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); *Printz v. United States*, 521 U.S. 898, 925 (1997) ("the Federal Government may not compel the States to implement ... federal regulatory

[4] *See also Dalton*, 511 U.S. at 470 (holding the Secretary of Defense's implementation of the President's decision to close a naval yard is not a "final agency action" reviewable under the APA); *Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 551-52 (D.C. Cir. 1994) (holding that the NAFTA trade agreement negotiated by the Trade Representative is not a "final agency action" subject to APA review because it was up to the President to decide whether to submit the agreement to Congress); *see also Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 860-61 (4th Cir. 2003) ("even when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transfer [a] challenged action into reviewable agency action under the APA").

programs"). But nothing in the Memorandum requires States to do *anything*, and this claim should therefore be dismissed.

While Plaintiffs allege that the federal government is attempting to coerce them to "assist the enforcement of federal immigration laws" or to "change their policies," Gov't Pls.' Am. Compl. ¶ 155, the Presidential Memorandum does not demand or require any specific effort that the Government Plaintiffs should devote toward immigration enforcement, let alone offer any "inducement [that is] impermissibly coercive," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). Instead, to the extent that the Memorandum refers to immigrant populations at all, it does so only in the context of setting forth the President's views on the scope of his delegated authority under 2 U.S.C. § 2a and on "principles of representative democracy." 85 Fed. Reg. at 44,679-80.

Indeed, the Memorandum does not incentivize or pressure the States to cooperate in enforcing federal immigration law in any way. Rather, the apportionment policy set forth in the Memorandum is wholly divorced from immigration enforcement, and its implementation is not conditioned on some unspecified degree of enforcement cooperation from the States. Even if the Plaintiff States here were to begin cooperating with federal immigration enforcement, the Memorandum, if implemented to its maximal extent, would (crediting Plaintiffs' allegations) nonetheless reduce their apportionment population base (just as it would for States which *have* rendered such cooperation). And the converse is also true: Plaintiff States may continue not to assist in federal immigration efforts, but the Memorandum would operate without regard to that independent stance.

Beyond the text of the Presidential Memorandum, Plaintiffs also have not proffered "sufficient factual matter" that supports a reasonable inference about the existence of an unstated, improper, and "coercive" purpose. Conclusory allegations as to the Memorandum's "coercive" purpose are clearly not enough under *Iqbal*. *See Hayden v. Patterson*, 594 F.3d 150, 161 (2d Cir. 2010) (under *Iqbal*, "allegations that are conclusory … are not entitled to the assumption of truth").[5]

[5] As the courts have long recognized, the Government's stated reason for its policy decision is entitled to a "presumption of legitimacy." *See Nat'l Archives & Record Admin. v. Favish*, 541 U.S. 157, 174 (2006) (recognizing that "a presumption of legitimacy [is] accorded to the Government's official conduct");

Further, insofar as Plaintiffs seek to ascribe a hidden, improper, coercive motive to the Presidential Memorandum because, in their view, this is of a piece with Defendants' immigration policies writ large, this also would not satisfy *Iqbal's* plausibility requirement. *See* 556 U.S. at 678 ("Where a complaint pleads facts that are *merely consistent with* a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (emphasis added and internal quotation marks omitted). Indeed, as another court in this District recently recognized in dismissing a Tenth Amendment coercion claim, it is well-established that courts "will not typically inquire into the hidden motives" for federal legislations and policies. *New York v. Mnuchin*, 408 F. Supp. 3d 399, 420 (S.D.N.Y. 2019) (internal quotation marks omitted) (dismissing Tenth Amendment challenge to federal tax law).

Similarly, courts have routinely held that directives and statutes do not violate the Tenth Amendment if they do not commandeer the states. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396–97 (2d Cir. 2008) (the "critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states," and holding that "[t]he PLCAA 'does not violate the Tenth Amendment as it does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.'") (quoting *Connecticut v. Physicians Health Servs. of Connecticut, Inc.*, 287 F.3d 110, 122 (2d Cir. 2002)). Here, the Presidential Memorandum does not implicate the Tenth Amendment because it does not command or compel state actors to take any action at all. Indeed, the Government Plaintiffs' Complaint does not allege that state actors were compelled to take specific action or refrain from taking specific action as a result of the Memorandum. Therefore, the Memorandum raises no commandeering issues, and the Court should dismiss the Tenth Amendment claim.

United States v. Armstrong, 517 U.S. 456, 464687 (1996) ("in the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties").

C. Plaintiffs Have Failed to Sufficiently Allege an Equal Protection Claim Under the Fifth Amendment

Plaintiffs allege that the Presidential Memorandum was impermissibly motivated by discriminatory animus based on race, ethnicity, and national origin. *See* Gov't Pls. Am. Compl. ¶¶ 147-52; NGO Pls.' Am. Compl. ¶¶ 208-21. To make these claims, however, Plaintiffs rely on two faulty pleading devices—*first*, they improperly equate the Memorandum's scrutiny of illegal aliens' status as "inhabitants of a state" with defining those individuals as non-persons; and, *second*, they inaccurately conflate the Memorandum's facially neutral distinction between lawful and unlawful aliens with racial or ethnicity-based disparate treatment. Shorn of these devices, Plaintiffs fail to allege the unlawful "animus" or "racially discriminatory intent" required to plead an equal protection violation. *See Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) ("*Regents*") ("To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision.").

At the outset, and citing *Dred Scott*, the NGO Plaintiffs allege that the Presidential Memorandum is "denying the *personhood* of people living in the United States." NGO Pls.' Am. Compl. ¶ 214 (emphasis in original). This hyperbolic claim, however, cannot be squared with the text of the Memorandum, which specifically explains that "[d]etermining *which persons* should be considered '*inhabitants*' for the purpose of apportionment requires the exercise of judgment." 85 Fed. Reg. at 44,679 (emphasis added). Plaintiffs' unfounded inference of animus also fails to acknowledge that the Memorandum treats foreign business and tourist visitors just as it treats illegal aliens—that is, as "persons" who should be excluded from apportionment, *id.*—yet no one, including Plaintiffs, contends the former category need be included in apportionment. In short, the Presidential Memorandum expressly acknowledges the "personhood" of illegal aliens, but seeks to "examine" their status, *vel non*, as "inhabitants of each state." *Id.* at 44,679-80.

Further, Plaintiffs inaccurately conflate the distinction drawn in the Presidential Memorandum between lawful and illegal aliens with racial or ethnicity-based disparate treatment. Notwithstanding Plaintiffs' suggestion to the contrary, there can be no dispute that the Memorandum is facially neutral

with respect to race, ethnicity, or national origin. To the extent that it makes any distinction between persons, the Presidential Memorandum is focused on the distinction between illegal aliens and citizens and other lawful residents. *See* 85 Fed. Reg. at 44,680. As the Supreme Court and the Second Circuit have both recognized, relying on this distinction does not require heightened scrutiny for equal protection purposes because non-citizens—much less illegal aliens—do not constitute a protected class. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976) (limitation on eligibility for a federal medical insurance program to citizens and long-term permanent residents did not violate Equal Protection Clause); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001) (upholding Welfare Reform Act's denial of prenatal care coverage to unqualified noncitizens against Equal Protection challenge).

Without the benefits of these two artifices, Plaintiffs are left with only conclusory allegations of animus, *see* Gov't Pls.' Am. Compl. ¶ 149; NGO Pls.' Am. Compl. ¶ 215, which are not sufficient to state an equal protection claim. Specifically, insofar as Plaintiffs rest their claim on a supposedly "disproportionate burden on Hispanics and immigrant communities of color," Gov't Pls.' Am. Compl. ¶ 150, this argument is foreclosed by the Supreme Court's recent *Regents* decision. As the Court recognized there, if the fact that an immigration policy would have "an outsized" impact on "Latinos" "because [they] make up a large share of the unauthorized alien population" by itself "were sufficient to a state a claim," then "'virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Regents*, 140 S. Ct. at 1916. Instead, as *Regents* concluded, an allegation of disproportionate burden on a specific racial or ethnic group is, in this context, inadequate to "establish[] a plausible equal protection claim." *Id.* at 1915.

Further, to the extent that Plaintiffs seek to base their equal protection claim on a purported link to the Commerce Secretary's decision to add a citizenship question to the 2020 Census, *see* Gov't Pls.' Am. Compl. ¶¶ 98, 150; NGO Pls.' Am. Compl. ¶ 132, the claim is implausible because these two actions involve separate decisions made by different decisionmakers that are distinct in terms of timing and implementation. In any event, Plaintiffs cannot bootstrap their equal protection claim here to the earlier decision because they "failed to prove, by a preponderance of the evidence, that a discriminatory purpose motivated Defendants' decision to reinstate the citizenship question on the

2020 census questionnaire."[6] *New York*, 351 F. Supp. 3d at 671; *see also Kravitz v. Dep't of Commerce*, 366 F. Supp. 3d 681, 712 (D. Md. 2019).[7]

Finally, Plaintiffs cite a number of alleged statements by the President and other individuals. *See* NGO Pls.' Am. Compl. ¶¶ 130-31, 138-39 (citing statements by Richard Hofeller, Kris Kobach, and Matt Schlapp). At the outset, because the President is the only decision-maker with respect to issuance of the Presidential Memorandum, statements of other individuals are immaterial. *See Regents*, 140 S. Ct. at 1916 (statements by non-decisionmakers "remote in time and made in unrelated contexts" are "unilluminating"). Moreover, to the extent that Plaintiffs discuss the President's statements, *see, e.g.*, Gov't Pls.' Am. Compl. ¶¶ 114-15; NGO Pls.' Am. Compl. ¶ 141, they fail to draw any specific link between those statements and the specific policy announced in the Presidential Memorandum. Thus, they cannot plausibly serve as evidence for his subjective motivations in issuing that discrete policy.

The face of the Presidential Memorandum plainly states that the policy's purpose was to promote "the principles of representative democracy underpinning our system of Government." 85 Fed. Reg. at 44,630. Plaintiffs have failed to plausibly allege that, notwithstanding this permissible purpose, it was merely a pretext for a "real reason" to discriminate against Hispanics, *St Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), or that it was motivated by such animus, *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Accordingly, the Equal Protection claim should be dismissed.

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[6] Merely alleging that the Presidential Memorandum is a continuation of the attempt to add a citizenship question is insufficient to plausibly assert discriminatory intent. Indeed, Plaintiffs' allegations on this score are circular—they want to rely on the earlier decision to bolster their claim of animus here, without acknowledging their own failure to prove animus as to the earlier decision. Further, Plaintiffs have not identified any basis for imputing the motivation of the earlier decision by Secretary Ross to the President's decision-making here—even though that is a flaw the Court specifically identified in the earlier proceeding. *See New York*, 351 F. Supp. 3d at 670 ("Plaintiffs failed to prove a sufficient nexus between President Trump and Secretary Ross's decision to make the President's statements or policies relevant to the equal protection analysis.").

[7] In a decision that later became moot, a district court in the citizenship-question context concluded that "newly discovered evidence" raised a "substantial issue" because it suggested "that Dr. Hofeller was motivated to recommend the addition of a citizenship question to the 2020 Census to advantage Republicans by diminishing Hispanics' political power." *Kravitz v. Dept' of Commerce*, No. 18-cv-1041 (D. Md. June 3, 2019), ECF No. 162-1 at 1.

D. Plaintiffs Have Failed to State an Apportionment Clause Claim

The operative Apportionment Clause mandates that Representatives shall be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. But, after accounting for the express exclusion of "Indians not taxed," neither this Clause nor its predecessor in Article I was ever understood to mandate the inclusion of every person present within the boundaries of each State at the time of the census. *See id.* art. I, § 2, cl. 3. To the contrary, from the time of the Founding through the ratification of the Fourteenth Amendment and continuing to the present day, the Apportionment Clause has been understood to require counting "inhabitants." In other words, only usual residents—those with a fixed and enduring tie to a State, as recognized by the Executive—need be deemed "persons *in [that] State*," *id.* amend. XIV, § 2 (emphasis added). And because the word "inhabitants" is sufficiently indeterminate, the Supreme Court has recognized that the term confers significant discretion on the Executive to make legal determinations about the "usual residence" of an individual without treating his physical presence in a particular jurisdiction (or lack thereof) as dispositive. *See Franklin*, 505 U.S. at 804-06.

This well-established framework plainly forecloses Plaintiffs' facial challenge to the Presidential Memorandum. For Plaintiffs to succeed, they must establish that the Constitution requires including *all* illegal aliens in the apportionment base. But that is obviously incorrect. To give just one example, nothing in the Constitution requires that illegal aliens residing in a detention facility after being arrested while crossing the border must be accounted for in the allocation of Representatives (and hence political power). This is fatal to Plaintiffs' Motion.

1. Only "Inhabitants" Who Have Their "Usual Residence" in a State Need Be Included in the Apportionment.

As the Supreme Court has explained, "'[u]sual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States." *Franklin*, 505 U.S. at 804. The Act also uses "other words [ ] to describe the required tie to the State: 'usual place of abode,' [and] 'inhabitant[.]'"

Id. at 804-05. These terms "can mean more than mere physical presence, and [have] been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.*

The settled understanding that only "inhabitants" who have their "usual residence" in the country must be counted stems from the drafting history of the Apportionment Clause. In the draft Constitution submitted to the Committee of Style, the Apportionment Clause required "the Legislature [to] regulate the number of representatives by the number of *inhabitants*." 2 The Records of the Federal Convention of 1787, at 566, 571 (Max Farrand ed., rev. ed. 1966) (emphasis added). The Committee of Style changed the language to provide that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. But "the Committee of Style 'had no authority from the Convention to alter the meaning' of the draft Constitution," *Utah v. Evans*, 536 U.S. 452, 475 (2002), and the Supreme Court has thus found it "abundantly clear" that, under the original Clause, apportionment "should be determined solely by the number of the State's inhabitants," *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964); *see also Franklin*, 505 U.S. at 804-05 (observing that "the first draft" of the Apportionment Clause "used the word 'inhabitant,' which was omitted by the Committee of Style in the final provision").

Historical sources confirm this reading. In *The Federalist*, James Madison repeatedly explained that apportionment under the new Constitution would be based on a jurisdiction's "inhabitants." *See The Federalist* No. 54, at 369 (Jacob E. Cooke ed., 1961) (observing that "the aggregate number of representatives allotted to the several States[] is to be determined by a federal rule founded on the aggregate number of inhabitants"); *The Federalist* No. 56, at 383 (noting that the Constitution guarantees "a representative for every *thirty thousand inhabitants*"); *The Federalist* No. 58, at 391 (noting that the Constitution mandates a "readjust[ment] from time to time [of] the apportionment of representatives to the number of inhabitants"); *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) ("[T]he basis of representation in the House was to include all inhabitants" (emphasis omitted)).

Similarly, as the Supreme Court recognized, the first enumeration Act of 1790—titled "an act providing for the enumeration of the inhabitants of the United States"—directed "the marshals of the several districts of the United States" to count "the number of the inhabitants within their respective districts." Act of Mar. 1, 1790, § 1, 1 Stat. 101, 101; *see Franklin*, 505 U.S. at 803-05 (relying on the Census Act of 1790 to apply the Apportionment Clause).

This understanding of "usual residence" and "inhabitant" was enshrined in the constitutional text and incorporated by historical practice when the Fourteenth Amendment's Apportionment Clause was ratified almost 80 years later. According to Representative Roscoe Conkling, a member of the committee that drafted the Fourteenth Amendment, the operative Apportionment Clause's streamlined language—requiring apportionment based on "the whole number of persons in each State"—was meant to fully include former slaves in the apportionment base and otherwise "adhere[] to the Constitution as it is." Cong. Globe, 39th Cong., 1st. Sess. 359 (1866). The Amendment's text confirms that understanding: it underscores that a person who possesses sufficient ties to a State will be included by specifying that "the persons *in each State*" must be counted, U.S. Const. amend. XIV, § 2 (emphasis added)—a phrase that the Supreme Court later explained to be equivalent to the term "inhabitant." *Franklin*, 505 U.S. at 804-05. Indeed, the very next sentence of section 2 of the Fourteenth Amendment equates "persons in each State" with "inhabitants" by penalizing in the apportionment any State that denies the right to vote to the "male inhabitants of such State" who would otherwise be eligible to vote (principally by reason of citizenship and age). *Id.* Unsurprisingly, the first census after ratification of the Fourteenth Amendment was conducted in accordance with the same procedures that had been used for the 1850 census, *see* Act of May 6, 1870, ch. 87, § 1, 16 Stat. 118, 118, which, in turn had required "all [States'] inhabitants to be enumerated," Act of May 23, 1850, ch. 11, § 1, 9 Stat. 428, 428; *see also Franklin*, 505 U.S. at 804 ("'Usual residence,' was the gloss given the constitutional phrase 'in each State' by the first enumeration Act [of 1790] and has been used by the Census Bureau ever since to allocate persons to their home States.").

Reading the Apportionment Clause to contemplate apportionment of Representatives based on "inhabitants" (or "usual residents") also helps explain the historical exclusion of certain people

from the apportionment base. For example, transient aliens, such as those temporarily residing here for vacation or business, are not included in the apportionment base. *See, e.g.*, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5,526, 5,533 (2018) (Residence Criteria); Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 980 (1991). That makes sense, as such aliens were not considered "usual residents" or "inhabitants" either at the Founding or the ratification of the Fourteenth Amendment. As contemporaneous sources using the term make clear, to qualify as an "inhabitant," one had to, at a minimum, establish a fixed residence within a jurisdiction and intend to remain there. *See, e.g.*, *Bas v. Steele*, 2 F. Cas. 988, 993 (Washington, Circuit Justice, C.C.D. Pa. 1818) (No. 1088) (concluding that a Spanish subject who had remained in Philadelphia as a merchant for four months before seeking to leave, "was not an inhabitant of this country, as no person is an inhabitant of a place, but one who acquires a domicil there").[8]

Likewise, foreign diplomats stationed overseas arguably remained "inhabitants" of their native countries rather than of their diplomatic posts. *See Franklin*, 505 U.S. at 805 (confirming that American diplomat stationed overseas could still qualify as an "inhabitant" who is "in" his home State for

[8] *See also, e.g, Hylton v. Brown*, 12 F. Cas. 1123, 1129 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 6,981) (charging jury while riding circuit that a particular individual "was no more an inhabitant of this state than I am, who spend one-third of each year in this city; or any other person, who comes here to transact a certain piece of business, and then returns to his family"); *Toland v. Sprague*, 23 F. Cas. 1353, 1355 (C.C.E.D. Pa. 1834) (No. 14,076) (distinguishing an "inhabitant" from a "transient passenger"); *United States v. Laverty*, 26 F. Cas. 875, 877 (D. La. 1812) (No. 15,569A) ("An inhabitant is one whose domicile is here, and settled here, with an intention to become a citizen of the country."); *United States v. The Penelope*, 27 F. Cas. 486, 489 (D. Pa. 1806) (No. 16,204) ("[T]he following has always been my definition of the words 'resident,' or 'inhabitant,' which, in my view, mean the same thing. 'An inhabitant, or resident, is a person coming into a place with an intention to establish his domicil, or permanent residence; and in consequence actually resides … .'"); 41 Annals of Cong. 1595 (1824) (referring to "the common acceptation" of "inhabitant" as "the persons whose abode, living, ordinary habitation, or home" is within a particular jurisdiction); Thomas Dyche & William Pardon, *A New General English Dictionary* (16th ed. 1781) ("a person that resides or ordinarily dwells in a place or home"); 1 & 2 Samuel Johnson, *A Dictionary of the English Language s. v.* abode, inhabitant, reside, residence, resident (6th ed. 1785) (a "[d]weller," or one who "lives or resides" in a place, with the terms "reside," "residence," and "resident" defined with reference to an "abode"—*i.e.*, a "continuance in a place"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "inhabitant" as a "dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor").

purposes of "the related context of congressional residence qualifications"); Emer de Vattel, *The Law of Nations*, ch. 19, § 213 (1817) (explaining that diplomats could not qualify as "inhabitants" because "the envoy of a foreign prince has not his settlement at the court where he resides"). And unsurprisingly, foreign diplomatic personnel living on embassy grounds have previously been excluded from the apportionment base. Murphy, *supra*, at 980.

Tourists and diplomats may be "persons" within a State's boundaries at the time of the Enumeration, but no one seriously contends that they must be included in the apportionment base under the Constitution. Physical location does not, in short, necessarily dictate whether one is an "inhabitant" (or "usual resident") of a particular jurisdiction.

2. The Executive Has Significant Discretion to Define Who Qualifies as an "Inhabitant."

Crucially, the term "inhabitant"—and the concept of "usual residence"—is sufficiently ambiguous to give Congress, and by delegation the Executive, significant discretion to define the contours of "inhabitants" for apportionment purposes. That discretion is rooted in the Constitution. Article I provides that apportionment numbers are determined by an "actual Enumeration" performed every 10 years "in such Manner as" Congress "shall by Law direct." U.S. Const. art. I, § 2, cl. 3; *see also id.* amend. XIV, § 5 (giving Congress the power to "enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including the operative Apportionment Clause). This "text vests Congress with virtually unlimited discretion in conducting the 'actual Enumeration,' [and] … [t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citations omitted). But the Secretary is not the final word on apportionment, and indeed is not the one responsible for determining the apportionment base. Instead, by statute, the Secretary must report census numbers to the President. *See* 13 U.S.C. § 141(b). And it is the President, then, who "transmit[s] to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing

number of Representatives." 2 U.S.C. § 2a(a). In doing so, the President has full "authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Franklin*, 505 U.S. at 799. So "the Secretary cannot act alone; she must send her results to the President, who makes the calculations and sends the final apportionment to Congress." *Id.* at 800. That "final act" by the President is "not merely ceremonial or ministerial," but remains "important to the integrity of the process." *Id.* Indeed, it is "the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives among the States. *Id.* at 799.

Of course, the Executive's decisions in this area must be "consonant with … the text and history of the Constitution," *Franklin*, 505 U.S. at 806, but the term "inhabitants"—and the concept of "usual residence"—are sufficiently indeterminate to give him significant discretion within constitutional bounds. *See id.* at 804-06 (discussing how the notion of "usual residence" has been applied differently over time). Indeed, Madison himself acknowledged that the word "inhabitant" was "vague" in discussing the House Qualifications Clause. 2 The Records of the Federal Convention of 1787, at 216-17; *cf. Franklin*, 505 U.S. at 805 (in the course of applying the Apportionment Clause, drawing on Madison's interpretation of the "term 'inhabitant'" in "the related context of congressional residence qualifications"). As noted, historical evidence confirms that the term "inhabitant" was understood to require, at a minimum, a fixed residence within a jurisdiction and intent to remain there. *See supra* at 30 n.8. Moreover, Founding-era sources also reflect that, especially with respect to aliens, the term could be understood to further require a sovereign's permission to enter and remain within a given jurisdiction. *See, e.g.*, *The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814) (Marshall, C.J., concurring in part and dissenting in part) (quoting Vattel for the proposition that "inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country" (emphasis added)); *The Federalist* No. 42, at 285 (Madison) (discussing provision of the Articles of Confederation that required every State "to confer the rights of citizenship in other States … upon any whom *it may allow to become inhabitants* within its jurisdiction" (emphasis added)).

Accordingly, the Executive has wide discretion to make legal determinations about who does and does not qualify as an "inhabitant" for purposes of inclusion in or exclusion from the apportionment base. In *Franklin*, for example, the Supreme Court held that the Executive Branch could allocate over 900,000 military personnel living overseas to their home States on the basis of the Secretary's judgment that such people "had retained their ties to the States." 505 U.S. at 806. That allocation "altered the relative state populations enough to shift a Representative from Massachusetts to Washington"—and had not been used "until 1970," save for a "one-time exception in 1900." *Id.* at 791-93. Nevertheless, as the Court explained, even though the recent approach was "not dictated by" the Constitution, it was "consonant with [its] text and history" and thus a permissible "judgment" within the Executive Branch's discretion, even where Congress had not expressly authorized this practice. *Id.* at 806. In the course of reaching this judgment, the Court also listed a number of other legal determinations of usual residency that the Executive Branch has permissibly chosen to use over the years—including determinations the Census Bureau has since abandoned. For example, "up until 1950, college students were counted as belonging to the State where their parents resided, not to the State where they attended school," and at the time the case was decided, "[t]hose persons who are institutionalized in out-of-state hospitals or jails for short terms [were] also counted in their home States." *Id.* Under the current Residence Criteria, however, college students who live at school during the academic year and prisoners housed in out-of-state jails, even for the short term, are counted in the State in which those institutions are located. Residence Criteria, 83 Fed. Reg. at 5,534, 5,535.

Plaintiffs have never challenged the Residence Criteria in court. To the contrary, they intervened to defend it *against* challenge in another case. *See Alabama v. Dep't of Commerce*, No. 18-cv-772 (N.D. Ala.), Mot. to Intervene, ECF No. 97 at 15 (Aug. 12, 2019). Plaintiffs' ongoing defense of the Residence Criteria suggests that not even they dispute that the Executive has discretion to define "inhabitant" and to determine who meets its strictures. *See Franklin*, 505 U.S. 804-06. Nor can they, given constitutional text, history, and Supreme Court precedent. The Presidential Memorandum is no different insofar as it reflects the Executive Branch's discretionary decision to direct the Secretary in making policy judgments that result in the decennial census. *Franklin*, 505 U.S. at 799.

3. The Apportionment Clause Does Not Require Inclusion of All Illegal Aliens as "Inhabitants" Having a "Usual Residence" in a State.

Plaintiffs maintain that the Presidential Memorandum facially violates the Apportionment Clause because *all* illegal aliens necessarily qualify as "persons in each State," and because the Memorandum contemplates the exclusion of such aliens—in some as-yet unknown number—for apportionment purposes. Put differently, Plaintiffs posit that the Constitution prohibits the exclusion of *any* illegal alien from the apportionment base, and that the Memorandum's announcement of that possibility violates the Apportionment Clause. But none of the constitutional constraints on the Executive's discretion to define the contours of "inhabitants" or "usual residence" require including *all* illegal aliens in the apportionment.

For example, if the Census Bureau finds it feasible to identify unlawfully present aliens who resided in a Customs and Border Patrol (CBP) or Immigration and Customs Enforcement (ICE) facility within a State on census day after being arrested while illegally entering the country, it would be permissible to exclude them. Such individuals—like alien tourists who happen to be staying in the country for a brief period on and around census day—cannot reasonably be said to have established "the required tie to [a] State," *Franklin*, 505 U.S. 804, or to be "inhabitants" under any definition of that term.[9]

Likewise, if feasibly identified, the Executive may exclude aliens who have been detained for illegal entry and paroled into the country pending removal proceedings, or who are subject to final

[9] These populations may be significant. During fiscal year 2019, ICE held in custody an average daily population of 50,165 aliens. U.S. ICE ERO, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*, at 5 (2019) (ICE ERO Report), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf. And on any given day in the summer of 2019, CBP held in custody between 8,000 and 12,000 detainees. *U.S. Customs and Border Protection – Border Patrol Oversight: Hearing Before the H. Subcomm. on Homeland Security of the Comm. on Appropriations*, 116th Cong. (2019) (testimony of Carla L. Provost, Chief, U.S. Border Patrol), https://docs.house.gov/meetings/AP/AP15/20190724/109834/HHRG-116-AP15-Wstate-ProvostC-20190724.pdf.

orders of removal.[10] Such aliens do not have enduring ties to any State sufficient to become "inhabitants" with their "usual residence" in the United States. The government has either allowed them into the country solely conditionally while it is deciding whether they should be removed, or has conclusively determined that they must be removed from the country. In *Kaplan v. Tod*, 267 U.S. 228 (1925), for instance, the Supreme Court addressed the case of an alien minor who had been denied entry at Ellis Island in 1914 but could not be returned to Russia during the First World War and was therefore paroled into the country to live with her father in 1915. When the case reached the Supreme Court almost ten years later in 1925, it turned entirely on the question whether the alien minor had been "dwelling in the United States" or had "begun to reside permanently" in the United States for purposes of federal immigration statutes, which would have conferred derivative citizenship on her upon her father's naturalization in 1920. *Id.* at 230. The Court held that, during her parole, she "never has been dwelling within the United States" and "[s]till more clearly she never has begun to reside permanently in the United States." *Id.* As the Court explained, she "could not lawfully have landed in the United States" because she fell within an inadmissible category of aliens, and "until she legally landed [she] 'could not have dwelt within the United States.'" *Id.* (quoting *Zartarian v. Billings*, 204 U.S. 170, 175 (1907)). In the Court's view, she was in "the same" position as an alien "held at Ellis Island for deportation." *Id.* at 230; *see also, e.g.*, *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (holding that parole cannot affect an alien's status and does not place an alien "legally 'within the United States'"). Indeed, the Supreme Court recently reaffirmed that "aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border,'" and that the same principle applies to those detained "shortly after unlawful entry." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020).

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[10] ICE's non-detained docket surpassed 3.2 million cases in fiscal year 2019, a population large enough to fill more than four congressional districts under the 2010 apportionment. ICE ERO Report at 10; Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf. The non-detained docket includes aliens who are both pre- and post-final order of removal, and who have been released on parole, bond, an order of recognizance, an order of supervision, or who are in process for repatriation. ICE ERO Report at 10.

Plaintiffs emphasize that Framers of both the original Apportionment Clause and the Fourteenth Amendment intended to include aliens in the apportionment base. Dkt. 77, at 16; *see id.* at 13-17. But Plaintiffs' historical evidence about the treatment of aliens does not and cannot resolve the distinct question whether *illegal* aliens must be included—for the simple reason that there were no federal laws restricting immigration (and hence no illegal aliens) until 1875. *See Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). And Plaintiffs provide no evidence to support the proposition that by employing the concepts of "inhabitants" and "usual residence," the Framers of either the original Constitution or Fourteenth Amendment were understood to have bound future generations to allocate political power on the basis of aliens living in the country in violation of federal law. To the contrary, as the Supreme Court has explained, the Framers understood the "fundamental proposition[]" that the "power to admit or exclude aliens is a sovereign prerogative." *Thuraissigiam*, slip op. at 35.[11] This "ancient principle[] of the international law of nation-states" is necessary to the sovereign's rights to define the polity ("the people") that make up the nation and to preserve itself, as both the Supreme Court and 19th-century international law scholars recognized.[12] It is fundamentally

[11] *See also, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

[12] *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *see, e.g.*, *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self- preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.") (citing Vattel and Phillimore); Vattel, *The Law of Nations*, bk. 2, §§ 94, 100 (explaining that the sovereign's authority to "forbid the entrance of his territory either to foreigners in general, or in particular cases," "flow[ed] from the rights of domain and sovereignty"); 1 Robert Phillimore, *Commentaries Upon International Law*, ch. 10, § CCXIX (1854) (similar); *see also, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."); *Chae Chan Ping*, 130 U.S. at 603–04 (recognizing that a sovereign's power to "exclude aliens from its territory" is "an incident of every independent nation" and is "part of its independence," and "[i]f it could not exclude aliens it would be to that extent subject to the control of another power"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an

antithetical to those elementary principles to say, as Plaintiffs do, that illegal aliens can arrogate to themselves the right to redistribute "political power" within this polity by flouting the sovereign power of the United States to define who can enter and become part of the polity. Pls.' Br. 10, 41, 51. Rejecting Plaintiffs' approach is certainly "consonant with" with the terms and history of the Fourteenth Amendment. *Franklin*, 505 U.S. at 806.

If anything, the debates over the Fourteenth Amendment on which Plaintiffs rely indicate that the rationale the Framers offered for including aliens in the apportionment base do not apply to illegal aliens. Specifically, various legislators made clear that unnaturalized aliens should be included in the apportionment base precisely because the law provided them with a direct pathway to citizenship—mainly, an oath of loyalty and five years of residence in the United States, *see* Act of Apr. 14, 1802, 2 Stat. 153. As Representative Conkling pointed out, "[t]he political disability of aliens was not for this purpose counted against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment." Cong. Globe, 39th Cong., 1st Sess., at 356 (1866) (emphasis added); *see also, e.g.*, *id.* at 3035 (Senator Henderson explaining that "[t]he road to the ballot is open to the foreigner; it is not permanently barred"). Indeed, the five-year residency requirement meant that aliens could "acquire [the vote] in the current decade"—and thus unnaturalized aliens could be voting citizens before the next apportionment. *Id.* at 354 (Representative Kelley). And even an opponent of the inclusion of aliens in the apportionment agreed that unnaturalized aliens were on "a short period of probation—five years; and in most of the states the great body of them are promptly admitted to citizenship." *Id.* at 2987 (Sen. Sherman). That rationale plainly does not extend to illegal aliens, who generally are prohibited by law from becoming citizens and are subject to removal. 8 U.S.C. §§ 1182(a)(9), 1227(a), 1255(a) & (c), 1427(a).

Plaintiffs are also wrong in arguing that *Plyler v. Doe*, 457 U.S. 202 (1982), requires the inclusion of illegal aliens in the apportionment base. Dkt 77, at 12. *Plyler* held only that illegal aliens are "persons

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external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.").

within the jurisdiction" of a State for purposes of the Equal Protection Clause, 457 U.S. at 210, which is inapposite here. In contrast to the Apportionment Clause, the Equal Protection Clause has never been understood to be limited to "inhabitants" or "usual residents" of a State. That is why no one seriously contends that alien tourists visiting the United States should be included in the apportionment base, even though they are undoubtedly "persons" protected by the Equal Protection Clause. *See also Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.").

Indeed, Plaintiffs' reading of *Plyler*—that *all* illegal aliens must be included in the apportionment—is at odds with history and precedent. Likewise, Plaintiffs' reliance on a redistricting decision, *Evenwel v. Abbott*, for the proposition that "the basis of representation in the House was to include all inhabitants," 136 S. Ct. 1120, 1127 (2016); Pls.' Br. 14, does not dispose of this case as Plaintiffs contend, but rather begs the central question here as to the limits on how "inhabitant" may be defined. Nothing in the terms "inhabitants" or "usual residence" suggests that this concept covers all illegal aliens. Rather, as noted above, the Supreme Court has observed that the term "'[u]sual residence' … has been used broadly enough to include some element of allegiance or enduring tie to a place." *Franklin* 505 U.S. at 804. In addition, the Founding generation was aware that the term "inhabitant" could be understood to require that an alien be given *permission* to settle and stay in a jurisdiction according to the definition provided by Vattel, whom the Supreme Court has extolled as the "founding era's foremost expert on the law of nations." *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *see* 1 Vattel, *The Law of Nations* ch. 19, § 213 (defining "inhabitants, as distinguished from citizens," as "foreigners, who are permitted to settle and stay in the country").[13] And in *Kaplan*,

[13] As the Supreme Court has observed: "The international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel. In 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'" *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 463 n.12 (1978) (ellipsis and citations omitted omitted).

the Supreme Court held that an alien who had not effected a lawful entry into the country could not be characterized as "dwelling" in the country under the latest version of a naturalization law dating from 1790 that had conditioned derivative citizenship for certain aliens on their "dwelling" in the United States—a concept linked with "inhabitants" since the Founding Era. 267 U.S. at 230; *see* Act of Mar. 26, 1790, § 1, 1 Stat. 103, 104. Illegal aliens, however, are necessarily limited in claiming that they have "enduring ties" to, or are "dwelling" in, this country, because as a matter of law they may be removed from the country at any time. *See also Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (applying *Kaplan* to an alien who "entered the United States at the age of seven, albeit illegally, and … remained in the country" for 16 years); *U.S. ex rel. De Rienzo v. Rodgers*, 185 F. 334, 338 (3d Cir. 1911) (explaining that an alien "cannot begin" to "reside permanently" in the United States "if he belongs to a class of aliens debarred from entry into the country by the act to regulate the immigration of aliens into the United States").

Ultimately, however, it is neither necessary nor appropriate for this Court to resolve whether any particular category of illegal aliens must be deemed "inhabitants" for purposes of the apportionment. In order to prevail on this facial challenge to the Presidential Memorandum, Plaintiffs must establish that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment. *See, e.g.*, *Deshawn E v. Safir*, 156 F.3d 340, 347 (2d Cir. 1998) ("A facial challenge will only succeed if there is no set of circumstances under which the challenged practices would be constitutional."). Plaintiffs have not, and indeed cannot, make that showing. Rather than facing that question, Plaintiffs divert attention by asking the Court to decide a much different question—and more than is necessary to resolve this case—by seeking a holding that the Apportionment Clause would prohibit the exclusion of all categories of aliens. That question is not properly presented here. The Presidential Memorandum states that it will be the policy of the United States "to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the *maximum extent feasible and consistent with the discretion delegated to the executive branch.*" 85 Fed. Reg. at 44,679 (emphasis added). And Plaintiffs have rushed to Court before the Census Bureau has determined which illegal aliens it may be "feasible" to

exclude, before the Census Bureau has reported any numbers to the Secretary, before the Secretary has reported any numbers to the President, and before the President has reported any numbers to Congress. Accordingly, this Court need not and should not resolve whether the Apportionment Clause necessarily *excludes* or *includes* any particular category of illegal aliens from the apportionment base. Rather, for Plaintiffs to prevail, they must establish that there is *no* category of illegal aliens that could ever be excluded. They cannot do so.

E. Plaintiffs Have Failed to State an *Ultra Vires* or "Separation of Powers" Claim

Plaintiffs posit that "[b]y requiring the exclusion of undocumented immigrants from the statutory phrases 'total population' and 'whole number of persons in each State,' the Memorandum directs the President and the Secretary of Commerce to perform unlawful, *ultra vires* actions." Pls.' Br. at 29. NGO Plaintiffs also allege that the President has violated the Constitution's separation-of-powers principle because Congress "delegated authority over the census to the *Commerce Secretary*, not the *President*." *See* NGO Pls.' FAC ¶¶ 222–36. However characterized, these claims fail. Like every other census and apportionment conducted under 13 U.S.C § 141 and 2 U.S.C. § 2a, the Memorandum fully complies with powers delegated by Congress under this statutory scheme.

Nothing in the statutory language of "total population," 13 U.S.C. § 141(b), or "whole number of persons in each State," 2 U.S.C. § 2a(a), requires counting every person physically present on Census Day, even if they lack "usual residence" in the United States.[14] It is, of course, true that "the word 'person' in § 2a makes no distinction based on citizenship or immigration status." Pls.' Br. at 29. And no one disputes that aliens (legal or illegal) are "persons." *Cf. Plyler v. Doe*, 457 U.S. 202 (1982). But § 2a does not reference only "persons"; it tracks the Fourteenth Amendment's text mandating apportionment based on the "whole number of persons *in each State*." 2 U.S.C. § 2a(a) (emphasis

[14] Everyone seems to agree that the Executive may lawfully *exclude* individuals from the enumeration and apportionment if they do not have a "usual residence" or "enduring tie" to a State. *See* Section III.E, *supra*; Pls.' Br. at 23 ("[T]emporary visitors are not included in the apportionment base precisely because the United States is not their 'usual residence.'"); Br. of *Amici Curiae* Historians at 11, ECF No. 105-1 ("The rationale for excluding [ ] limited categories of noncitizens is clear and entirely consistent with the Framers' intent, and longstanding census practice, to count all persons *residing* in the United States.").

added). So while Plaintiffs argue that Congress is "presumed to legislate with familiarity of the legal backdrop for its legislation," Pls.' Br. at 30 (quoting *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 114 (2d Cir. 2017)), that legal backdrop only *supports* the exclusion of individuals from apportionment if they do not have a "usual residence" in the United States. *Franklin*, 505 U.S. at 804; *accord* Pls.' Br. at 30 (arguing that when "Congress used the materially same language in a statute it . . . intended for [the language] to retain its established meaning" (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018)); *id.* at 32 (contending that "2 U.S.C. § 2a, has always been understood to include people who *reside* in a particular State" (emphasis added)). That is why no apportionment conducted under the Census Act has included literally everyone physically present in the country. *See* Br. of *Amici Curiae* Historians at 10 ("This 'usual residence rule' is consistent with the Framers' repeated emphasis on counting 'inhabitants' on United States soil . . . and has remained the guiding principle for census-taking for 230 years."). Just as the Memorandum does not violate the Constitution merely by contemplating the exclusion of some as-yet-unknown number of illegal aliens for lack of "usual residence," neither does it violate the identical language of § 2a.[15] *See* Section III.E, *supra*.

Nor does it matter that the President is making an independent choice in the apportionment process. While the apportionment calculation itself—feeding numbers into a mathematical formula known as the "method of equal proportions"—is "admittedly ministerial," there is nothing "ministerial" about the President's role in obtaining the numbers used in that formula. *Franklin*, 505 U.S. at 799 (explaining that "the admittedly ministerial nature of the apportionment calculation itself does not answer the question [of] whether the apportionment is foreordained by the time the Secretary

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[15] This "usual residence" approach is consistent with the approach taken in the Census Bureau's 2018 Residence Criteria, which Plaintiffs are currently defending in other litigation and touting here. *See* Section III.E, *supra*; Pls.' Br. at 31–32. As with every census, the Census Bureau always planned to exclude some people from the 2020 Census without a "usual residence" in a particular State. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018).

gives her report to the President"). To the contrary, "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" *Id.*[16] And that is exactly what the President has done here: direct the Secretary to report two sets of numbers, of which the President will choose one to plug into the "method of equal proportions. *See* 2 U.S.C. § 2a(a); 85 Fed. Reg. at 44,680.

Plaintiffs' position is incompatible with the Supreme Court's view of the President's role as more than "merely ceremonial or ministerial." *Compare* Pls.' Br. 32, 36–37 *with Franklin*, 505 U.S. at 789. "[I]t is the President's personal transmittal of the report to Congress" that "settles the apportionment" of Representatives, making the President "important to the integrity of the process." *Franklin*, 505 U.S. at 799–800. Plaintiffs' attempt to reduce the President to mere statistician cannot be squared with the Supreme Court's holding that § 2a contemplates his exercise of substantial discretion.[17]

Plaintiffs also seek to contravene Supreme Court precedent (and 230 years of history) by arguing that the numbers used for apportionment must be derived solely from individual responses

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[16] Other courts since *Franklin* have likewise understood that § 2a allows the President to perform a significant role beyond the mere "ministerial" calculation leading to reapportionment. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 860 (4th Cir. 2002) (likening an EPA report to the Secretary's § 141(b) report because it "is advisory and does not trigger the mandatory creation of legal rules, rights, or responsibilities," allowing the President "to embrace or disregard" the Secretary's report); *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993) (characterizing the Commerce Secretary's report to the President a "moving target" because "the President has statutory discretion to exercise supervisory power over the agency's action); *Alabama v. Dep't of Commerce*, 396 F. Supp. 3d 1044, 1055 (N.D. Ala. 2019) (noting that in fulfilling his responsibilities under § 2a, "the President is not necessarily bound to follow the Secretary's tabulation").

[17] Plaintiffs also seem to suggest that that the Memorandum is unlawful merely because the President has directed the Secretary to provide information about illegal aliens. *See, e.g.*, Pls.' Br. 29, 38. But that contention also fails. Article II empowers the President to supervise the conduct of subordinate officials like the Secretary, *see* U.S. Const., art. 2, § 1, and the Opinions Clause further empowers the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.*, art. 2, § 2, cl. 2. In *Franklin*, even the dissenting Justices acknowledged that § 2a "does not purport to limit the President's 'accustomed supervisory powers' over the Secretary of Commerce." 505 U.S. at 813 n.11 (Stevens, J., dissenting). So Plaintiffs cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it.

to the census questionnaire. *See* Pls.' Br. at 33–36. But the census has *never* tallied the total number of "usual residents" based only on questionnaire responses. In fact, for the first 170 years of American census taking, no census questionnaire existed because all enumeration was done in person. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 520 (S.D.N.Y.) (Furman, J.), *aff'd in part, rev'd in part and remanded,* 139 S. Ct. 2551 (2019). And for the 2020 Census, individuals have been, and will be, enumerated through (1) census-questionnaire responses online, by mail, or by phone; (2) in-person visits by enumerators; (3) "proxy" responses given by those such as a neighbor or landlord; (4) high-quality administrative records from other federal agencies; and, as a last resort, (5) filling gaps in enumeration data by imputing other data from the same area. *Id.* at 521. In the citizenship-question litigation, Plaintiffs elicited extensive testimony on each of those enumeration methods, but never suggested that any of them violated the Census Act. *See generally id.* at 572–626. Indeed, the Supreme Court has *specifically approved* the use of purported "non-census data"—like administrative records and imputation—in apportionment without remotely hinting that either one was unlawful. *Compare* Pls.' Br. at 35–36 (taking issue with the hypothetical use of administrative records from other federal agencies) *with Franklin*, 505 U.S. at 794–96, 803–06 (approving the Census Bureau's use of "home of record" information from Defense Department personnel files for apportionment) *and Utah v. Evans*, 536 U.S. 452, 457–59, 473–79 (2002) (approving the Census Bureau's use of "hot-deck imputation" for apportionment).

In any event, it is entirely premature for Plaintiffs to surmise that "the President will necessarily have to rely on information that is not contained within the census" if he is going to exclude some as-yet-unknown number of illegal aliens from apportionment. Pls.' Br. at 35. As discussed above, it is not yet known what numbers the Secretary will transmit to the President pursuant to the Presidential Memorandum. *See supra* at 8. And Plaintiffs cannot assume that those numbers will be derived from purported "non-census data.".

Put simply, Plaintiffs' attempt to manufacture an *ultra vires* or separation-of-powers claim detached from their Apportionment Clause claim is unavailing. By delegation of the Census Act, the Executive stands in the shoes of Congress and may properly exclude individuals from apportionment

for lack of "usual residence"—just as he has done in every other apportionment calculated under the Census Act.

F. Plaintiffs' Demands for Relief Against the President Must Be Dismissed

Plaintiffs ask this court to enjoin the President from implementing the policy in the Presidential Memorandum, to issue a writ of mandamus to that effect, and to declare his policy decision unlawful. *See* Gov't Pls.' Am. Compl. at 45 (Prayer for Relief ¶¶ 1-4, 7); NGO Pls.' Am. Compl. at 88 (Request for Relief ¶¶ (i)-(iv), (vi), (vii)). As the Supreme Court has long recognized, however, federal courts cannot exercise injunctive authority over the President's discretionary policy judgments. *See Mississippi v. Johnson*, 4 Wall 475, 501 (1867) (the judicial branch has "no jurisdiction of a bill to enjoin the President in the performance of his official duties"). This limitation reflects the respect due to the President's "unique position in the constitutional scheme." *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27, 749-50 (1982) (declining to assume that implied damages "cause[s] of action run[] against the President"). In *Franklin*, the Supreme Court reaffirmed this constitutional principle. *See* 505 U.S. at 802 (noting that "grant of injunctive relief against the President [] is extraordinary, and should have raised judicial eyebrows"). Plaintiffs may contend that their injunctive claims fit within a narrow exception that the Supreme Court potentially left open for injunctive claims that seek to direct the President to perform "ministerial" functions. *See Franklin*, 505 U.S. at 802-03 (noting that *Mississippi v. Johnson* "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty"); *see also Mississippi v. Johnson*, 4 Wall at 500 (defining "ministerial duty" as "one in respect to which nothing is left to discretion").

Franklin, however, forecloses that argument in this case. Specifically, the Supreme Court recognized that under 2 U.S.C. § 2a, "the Secretary [of Commerce] cannot act alone"; instead, the President has the "authority to direct the Secretary in making policy judgments." *Franklin*, 505 U.S. at 799-800. This "clear[ly]" demonstrates Congress's belief that "it was important to involve a constitutional officer," *i.e.*, the President, "in the apportionment process." *Id.* at 799. The President's role and "duties" in the congressional apportionment process, therefore, "are not merely ceremonial or ministerial." *Id.* at 800.

Put simply, even if *Franklin* and *Mississippi v. Johnson* could be read to allow injunctive claims seeking performance of purely ministerial functions, that possible exception has no application here—because the President's implementation of the Presidential Memorandum is part of his duties under 2 U.S.C. § 2a, which "are not merely ceremonial or ministerial." Instead, *Franklin* applies squarely to Plaintiffs' injunctive claims against the President, and requires the dismissal of those claims. 505 U.S. at 802-03.

Moreover, and at a minimum, even if injunctive relief against the President in the performance of his statutory duties were theoretically available, *Franklin* makes clear that it "would require an express statement by Congress" authorizing such relief. *Franklin*, 505 U.S. at 801. Plaintiffs have identified no such "express statement" and none exists.

Finally, although declaratory relief claims against the President may be viable under existing Second Circuit law, *see Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2018), other courts have questioned the appropriateness of such claims. For example, the D.C. Circuit, following *Franklin*, has determined, "declaratory relief" against the President for his non-ministerial conduct "is unavailable." *Newdow v, Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010). This is because "a court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Id.* at 1012 (emphasis added) (citing *Mississippi*, 71 U.S. at 499); *see also Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) ("Sound separation-of-power principles counsel the Court against granting [injunctive and declaratory] relief against the President directly."). Thus, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Swan v. Clinton*, 100 F.3d at 973, 978 (D.C. Cir. 1996).

IV. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY OR PERMANENT INJUNCTION

If the Court declines to dismiss Plaintiffs' claims, it should nonetheless deny Plaintiffs' request for the extraordinary relief of a permanent or preliminary injunction.

Although Plaintiffs seek partial summary judgment on their Apportionment Clause and *ultra vires* claims, they do not specify what remedy they wish to accompany that judgment. Presumably,

however, Plaintiffs would have this Court enter, at minimum, a permanent injunction prohibiting Defendants "from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy." NY FAC at 45, ¶ 4; *see* NGO FAC at 88, ¶¶ 3-4. Unlike the motion-to-dismiss context in which Plaintiffs' well-pleaded allegations are accepted as true, *Chamberlain Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020), the "extraordinary remedy" of an injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 169 (S.D.N.Y. 2010) (contrasting the standing inquiry on a motion to dismiss with the "heavy burden of clearly establishing the 'actual and imminent' threat of irreparable harm" for an injunction). To obtain permanent injunctive relief, Plaintiffs bear the burden of demonstrating (1) that they have suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the parties, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

While Plaintiffs appear to understand that these factors are required to obtain a *preliminary* injunction, Pls.' Br. at 40, they fail to acknowledge that these same factors must be met to obtain permanent relief as well. Insofar as Plaintiffs believe they are entitled to any form of injunctive relief without satisfying other factors, they are incorrect. *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."); *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 272 (2d2011); *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). As explained above, Plaintiffs' Apportionment Clause and *ultra vires* claims lack merit and their request for partial summary judgment and an injunction should be rejected for that reason alone. *Winter*, 555 U.S. at 32–33. Even if these

claims were meritorious, however, Plaintiffs could not satisfy the remaining factors, so they would not be entitled to either preliminary or permanent injunctive relief.

A. Plaintiffs Cannot Establish Any Imminent and Irreparable Harm

Most significantly, Plaintiffs fail to establish that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." (internal quotes and citations omitted; emphasis in original)). To establish a likelihood of irreparable harm, a plaintiff "must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted). Because a preliminary injunction "is one of the most drastic tools in the arsenal of judicial remedies," *id.*, Plaintiffs' burden to show irreparable harm is necessarily higher than what is required to establish standing. *See, e.g.*, *Mazurek*, 520 U.S. at 972. Here, Plaintiffs fail this test at every step—and further fail to establish that the remaining injunction factors tilt in their favor.

1. Plaintiffs Cannot Establish Any Irreparable Apportionment Injury

Because Plaintiffs rushed to Court before the Secretary has implemented the Memorandum—and before any census enumeration has even been completed—Plaintiffs cannot show any imminent threat of apportionment injury.

As detailed above, it is currently unknown what numbers the Secretary may ultimately transmit to the President. *See supra* at 8; Abowd Decl. ¶ 15. Plaintiffs' expert declarations posit only that the *wholesale* exclusion of illegal aliens may cause certain states to lose a Congressional seat. *See* Pls.' Br. at 49–50; *see generally* Warshaw Decl. But those experts do not—and cannot—predict what apportionment injury any state might suffer from some hypothetical smaller exclusion, assuming a state suffers any injury at all. Given that the Secretary of Commerce has not yet transmitted his report to the President, and the President has not yet transmitted any numbers to Congress, any effort to

predict the ultimate effect of the Memorandum on apportionment, or the resulting "political power of Plaintiffs' constituents," Pls.' Br. at 41, is entirely speculative.

More fundamentally, any purported apportionment injury that Plaintiffs could suffer is, as a legal matter, not irreparable. The Supreme Court has regularly decided census cases that, like this one, contest the relative apportionment of representatives post-apportionment, because an erroneous or invalid apportionment number can be remedied after the fact.[18] *See, e.g., Utah*, 536 U.S. at 462 (holding that post-apportionment redress is possible if the apportionment calculation contains an error); *see also Franklin*, 505 U.S. at 803 (finding that a post-apportionment order against the Secretary would provide redress for plaintiffs); *Dep't of Commerce v. Montana*, 503 U.S. 445-46 (1992); *Wisconsin v. City of New York*, 517 U.S. 1 (1996). Indeed, in *Wisconsin*, it was not until *six years* after the 1990 census that the Court resolved an apportionment dispute based on those results. This case is not different. As this Court noted in requesting the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, "the Presidential Memorandum does not purport to change the conduct of the census itself[;] [i]nstead, it relates the calculation of the apportionment base used to determine the number of representatives to which each state is entitled." ECF 68 at 2. Accordingly, this Court could order adequate relief after apportionment when any injury to Plaintiffs is known with certainty, assuming there is any at all. Indeed, the very fact that the Memorandum calls for the Secretary to report two numbers—one arrived at after the Census Bureau applies its Residency Criteria, and another reflecting the number of illegal aliens that the Secretary is able to identify—makes clear that a post-apportionment remedy would be easy to craft.

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[18] The only census cases decided by the Supreme Court pre-apportionment involved challenges to the mechanics of conducting the census, which could not be undone post-apportionment. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (challenge to a citizenship question on the 2020 Census); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (challenge to the use of statistical sampling in the census).

2. Plaintiffs' Allegations of Enumeration Injury Do Not Withstand Scrutiny

Plaintiffs' alternative efforts to link the Memorandum to some ongoing enumeration injury fare no better. As explained by Associate Director Fontenot, the Memorandum does *not* affect how the Census Bureau is conducting its remaining enumeration operations. *See* Fontenot Decl. ¶¶ 7, 12; *see generally* Census Bureau, *Review of 2020 Operational Plan Schedule*, Aug. 17, 2020, https://2020census.gov/content/dam/2020census/materials/news/2020-operational-plan-schedule-review.pdf ("Operational Plan") Those operations include a variety of protocols specifically designed over the course of the past decade to ensure that hard-to-count and minority communities—some of the core constituencies for which Plaintiffs advocate—are accurately reflected in the census. *See generally* Fontenot Decl. ¶¶ 11, 12; Operational Plan at 2-11 (describing non-response follow-up, and other efforts to achieve "acceptable level of accuracy and completeness, with a goal of resolving at least 99% of Housing Units in every state, comparable with previous censuses").[19] Plaintiffs speculate that, notwithstanding these protocols, the Memorandum "and Defendants' corresponding public statements" will render the enumeration less accurate—purportedly by deterring immigrant communities from participating. Pls. Br. at 42, 47. But these claims suffer from at least three fundamental flaws, each of which seriously undermines the causation Plaintiffs are trying to establish.

a. Plaintiff's Theory of Harm Relies on Attenuated Events Involving the Independent Actions of Third-Parties

First, as discussed in the standing section, Plaintiffs' theory for why the Memorandum may depress response rates relies on a highly attenuated chain of events. Plaintiffs' expert, Dr. Barreto, opines that immigrant communities are less likely to respond to the census after the Memorandum because of how that Memorandum is discussed in the media and by community activists. Barreto Decl. ¶¶ 15-16, 32. But those independent actors' messages are the product of their own

[19] *See also 2020 Census Detailed Operational Plan for: 18. Nonresponse Followup Operation (NRFU)*, Apr. 16, 2018, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan.pdf; *see also 2020 Census Research and Testing Management Plan*, Dec. 28, 2015, https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/research-testing-plan.pdf, at 7.

interpretation, and often at odds with the plain terms of the Memorandum. *See, e.g.*, Torres Decl. ¶ 18., ECF No. 76.47 (stating that CASA de Maryland, Inc. "was approached by a number of media outlets, including CNN, to represent the reaction of our community . . . [and] conveyed how harmful the action is and our commitment to ensuring that our members are fully counted."); Barreto Decl. ¶ 33 (listing media messages characterizing the Memorandum as something "intended to promote fear"); *id.* ¶ 46 (noting that aliens "may not do the full research to realize they can still fill out the Census safely, *because they hear the news which is connecting* the July 21 [Memorandum] to Trump's longstanding desire to increase deportation of undocumented immigrants" (emphasis added)). It makes little sense to attribute whatever harm is caused by those independent actors' messaging to the Memorandum itself, particularly if their messages convey the incorrect impression that the Memorandum increases the "risk of [individuals'] information being linked to immigration records and [those individuals] facing immigration enforcement." Barreto Decl. ¶¶ 62, Pls. Br. at 43 (citing various declarations speculating that the Memorandum is likely to create fear of immigration enforcement). Given the strong privacy protections for census response data, any suggestion that the Secretary's compliance with the Memorandum will somehow facilitate immigration enforcement is flatly wrong. *See generally* 13 U.S.C. § 9 (providing that personal information collected by the Census Bureau cannot be used against respondents by any government agency or court); *id.* § 214 (setting forth penalty for wrongful disclosure of information).

b. Plaintiffs' Theory of Harm Is Limitless

Second, setting aside the role of independent actors, Plaintiffs' theory of harm proves too much. Plaintiffs' core claim is that the Memorandum will depress aliens' participation in the census by allegedly "send[ing] a clear message that this community does not count and should be left out of the democratic process." Pls. Br. at 42; *see, e.g.*, Barreto Decl. ¶ 14; Choi Decl. ¶¶ 16-18 (Ex. 14); Torres Decl. ¶ 19 (Ex. 47). But the same line of reasoning could apply to almost any government action or statement that Plaintiffs find disagreeable. As Plaintiffs themselves acknowledged during the initial status conference with the Court, their theory would recognize harm sufficient for standing (and presumably for a preliminary injunction) based on a President's mere statements suggesting that he is

exploring new legislation that would permit the Census Bureau to share data with immigration enforcement agencies. *See, e.g.*, Conference Tr. 34:13–35:6. That makes little sense.

The transmission of a general policy message—like the kind Plaintiffs claim the Memorandum sends—cannot suffice to show that irreparable harm is imminent or likely. *Winter*, 555 U.S. at 12, 20. The Supreme Court has repeatedly rejected efforts to conjure irreparable injury from a hypothetical series of events that could theoretically cause a plaintiff injury. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Rizzo v. Goode*, 423 U.S. 362, 372–73 (1976). Indeed, it has explicitly noted that allegations of "fear[]" of future harm must be assessed for reasonableness: "[i]t is the *reality* of the threat of" future harm that is relevant, "not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8 (emphasis added). Where, as here, fear is based on a series of conjectures and subjective misinterpretations—tethered not to something the government has actually done, but to some different policy the government might (or might not) pursue in the future—such fear cannot form the basis for irreparable harm. *See id.* at 107. Merely harboring an objection to the President's expression of a policy preference falls far short of the standard for injunctive relief.

c. The Alleged Harm is at Odds with Existing Evidence

Third, and finally, Plaintiffs' claims that the Memorandum is likely to decrease response rates is simply inconsistent with empirical evidence. Plaintiffs go to great lengths to analogize the Memorandum to a citizenship question on a census questionnaire. *See, e.g.*, Pls. Br. at 42; Barreto Decl. ¶¶ 14, 18, 24, 28, 57, 68, 86. But, as noted above, a randomized control trial published by the Census Bureau after the Supreme Court issued its opinion in the citizenship question litigation found *no* statistically-significant depression of response rates for households that received a test questionnaire containing a citizenship question. *See* Abowd Decl. ¶ 13; *see also 2019 Census Test Report,* Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Test Report). As explained by Dr. Abowd, this test contained a sample of 480,000 housing units, and was "capable of detecting response differences as small as 0.5 percentage points." *See* Abowd Decl.¶ 13. And while some narrow subgroups did exhibit statistically-significant lower self-response rates, Census Test Report at x, the

Census Bureau concluded that "[c]urrent plans for staffing for Nonresponse Followup would have sufficiently accounted for subgroup differences seen in this test." *Id.* This result was contrary to the prediction of experts who previously testified during the citizenship-question litigation, and some of whose declarations Plaintiffs again submit now. *See generally* Abowd Decl. ¶ 13; *see, e.g.*, Barreto Decl. ¶ 68. As Dr. Abowd reports, this finding illustrates the benefit of a "randomized controlled design," which properly isolates the independent variable (there, the citizenship question) and measures its effects. Abowd Decl. ¶ 13.

Plaintiffs cannot reasonably contend that the Memorandum would have a greater effect on response rates than did the citizenship question. Unlike a question on a census questionnaire, the Memorandum does not call for respondents to submit any information, and it changes nothing about the enumeration process. *See* 85 Fed. Reg. at 44,679 (directing the Secretary to make use of existing information). Indeed, neither Dr. Barreto nor any other declarant proffered by Plaintiffs identifies a rigorous survey or statistical study measuring whether this kind of internal Government action, which seeks nothing of respondents and has no connection to immigration enforcement, has any effect on response rates within immigrant communities. *See generally* Barreto Decl. ¶¶ 39-86. And nothing Plaintiffs submit purports to statistically measure the effect of the Memorandum itself on response rates. *See generally* Barreto Decl. ¶¶ 39-86; Thompson Decl. ¶¶ 21–23 (offering an opinion about the effect of the Memorandum without relying on a source of data).

Under these circumstances, Plaintiffs cannot be said to establish anything more than the abstract "possibility of irreparable injury." *Nken*, 556 U.S. at 434. But, as the Supreme Court has emphasized, the "'possibility' standard is too lenient" a basis upon which to issue the drastic remedy of a preliminary injunction. *Winter*, 555 U.S. at 22. Given that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction," *Faiveley Transport. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009), Plaintiffs' failure to establish anything more than the theoretical possibility of harm is sufficient basis to deny the injunction they seek.

B. The Remaining Factors Weigh Against an Injunction

On the other side of the ledger, the harm to the government and to the public interest from an injunction would be great, and immediate. *See Nken*, 556 U.S. at 435 (explaining that harm to opposing party and weighing the public interest "merge" when relief is sought against the government). In particular, an injunction would impede the Executive's historic discretion in conducting both the census and the apportionment, contrary to Congressional intent. *See generally Franklin*, 505 U.S. at 796-800. Plaintiffs discount these interests, arguing that the Government cannot have an interest in enforcing "an unconstitutional law," Pls. Br. at 51, but that argument only holds if Plaintiffs are correct on the merits of their argument—which, as explained above, they are not.

In any event, Plaintiffs' conception of the balance and hardship and public interest collapses those two parts of the traditional four-part injunction test into the very first prong: merits. As the Supreme Court has emphasized, however, that should not be done. *See Winter*, 555 U.S. at 32. The public interest prong is a stand-alone requirement that must be met separately, and cannot be short-circuited at plaintiffs' whim. *Id.*

Plaintiffs vaguely suggest that enjoining the Memorandum would allegedly remedy "Defendants' misinformation." Pls. Br. 52. But the only misinformation Plaintiffs have identified in this case is the misinterpretation of the Memorandum by the various activists and news sources that their expert, Dr. Barreto, and their other declarants describe in their declarations. *See* Barreto Decl. ¶¶ 66-69 (Ex. 56); Choi Decl. ¶ 24-25 (Ex. 14); Seon Decl. ¶ 22 (Ex. 43); Torres Decl. ¶ 24 (Ex. 47). Plaintiffs have never identified one piece of "misinformation" that the Defendants disseminated about the Memorandum. Any attempt to remedy misinformation would therefore require an injunction against some other entity. The public interest may favor that injunction, but it does not favor an injunction against Defendants here.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and dismiss these consolidated actions. In the event the Court declines to grant Defendants' motion to dismiss, Plaintiffs' motion for partial summary judgment or preliminary injunction should be denied.

Dated: New York, New York

August 19, 2020

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York

DAVID MORRELL
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

DIANE KELLEHER
BRAD ROSENBERG
Assistant Branch Directors

/s/ Elliott M. Davis
DANIEL D. MAULER (VA Bar No. 73190)
ELLIOTT M. DAVIS (NY Reg. No. 4596755)
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L St. NW
Washington, DC 20005
Phone: (202) 353-5639
Fax: (202) 616-8470
E-mail: elliott.m.davis@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LA UNIÓN DEL PUEBLO ENTERO, *et al.*, Plaintiffs, v. WILBUR L. ROSS, in his official capacity as U.S. Secretary of Commerce, *et al.*, Defendants.	No. 8:19-cv-02710-GJH

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Secretaries of Commerce have long exercised their statutory authority to gather administrative records—files from other federal and state agencies—in aid of their mission to provide vital statistics to the nation. After the Secretary's unsuccessful attempt to obtain citizenship data using a citizenship question on the 2020 Census, the President issued Executive Order 13880 in July 2019 with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." Exec. Order No. 13880, 84 Fed. Reg. 33821 (July 11, 2019). While the Secretary had collected enough administrative records for the Census Bureau (the primary statistical agency in the Department of Commerce) to "determine citizenship status for approximately 90 percent of the population," he "remain[ed] in negotiations to" access "several additional important sets of [administrative] records with critical information on citizenship." *Id.* The President therefore directed "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible" in order "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the Department." *Id.*

Plaintiffs—individuals and organizations concerned about their *States and localities'* potential use of citizenship data—now take issue with a process decades in the making: the Secretary's collection of administrative records, facilitated by the President's

internal guidance to federal agencies, to obtain comprehensive citizenship data on the U.S. population. In seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380," Plaintiffs' First Amended Complaint (FAC) alleges violations of the Administrative Procedure Act (APA), the Fifth Amendment's equal protection component, and 42 U.S.C. § 1985(3) (civil conspiracy). FAC ¶¶ 88–117, ECF No. 41; *Id.* at 31. But the FAC is fatally flawed from beginning to end.

The Secretary's administrative-record collection does not affect any private parties, let alone Plaintiffs. It is only when Plaintiffs' *States and localities* "discriminatorily" choose to use citizenship data that Plaintiffs could possibly be injured. *See* FAC ¶ 87. So they lack standing, and their suit is unripe, because their injuries can only result from a highly attenuated chain of possibilities, including the independent decisions of States and localities to use (or not use) citizenship data. This also torpedoes Plaintiffs' APA and equal protection claims, as the Secretary's administrative-record collection is neither "agency action" for APA purposes, nor does it cause a "disparate impact" for equal protection purposes.

If that were not enough, Plaintiffs' § 1985(3) is barred on several threshold grounds, including sovereign immunity and a lack of statutory authorization for injunctive relief. And Plaintiffs do not plausibly allege any facts supporting their equal protection and § 1985(3) claims, instead relying almost exclusively on the events leading

up to *a citizenship question*, not the collection of administrative records. Plaintiffs' FAC is meritless and should be dismissed.

BACKGROUND

I. The Secretary's Collection of Administrative Records and Citizenship Data

The use of administrative records is not new. In the 1890 Census, for example, "special enumerators visited real estate recorders' office[s] [ ] to obtain data on individual and corporate debt."[1] And after the Department of Commerce was formed, Congress specifically empowered the Secretary of Commerce, "whenever he considers it advisable," to "call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work" of the Census Bureau. 13 U.S.C. § 6(a).[2] Secretaries have routinely exercised this power to collect and use administrative records. As just two of many examples, administrative records have been used since the 1940s to help produce population estimates between censuses,[3] and in 1954 the Census

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[1] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[2] The Secretary may also acquire similar information from "States, counties, cities, or other units of government," or "from private persons and agencies." 13 U.S.C. § 6(b).

[3] U.S. Census Bureau, *Current Population Reports, Population Estimates* (Aug. 13, 1948), at 2, https://www2.census.gov/library/publications/1948/demographics/P25-13.pdf.

Bureau implemented "large-scale use of administrative records" from the Internal Revenue Service as part of the Economic Census.[4]

The Secretary has collected administrative records containing citizenship data since at least 2002.[5] But the Census Bureau has never had a full set of administrative records to determine citizenship for every person in the country. To inform immigration policy, support research, plan investments, design programs, and aid Voting Rights Act enforcement—which requires citizenship estimates to determine the number of eligible voters in a given geographic area—the Census Bureau has used sample-based surveys. From 1970 to 2000, the Census Bureau used the long-form census, a set of over thirty questions (including citizenship) sent to one in six households during each decennial census. *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681, 693 (D. Md. 2019). The long form was discontinued after the 2000 Census and replaced by the American Community Survey (ACS) in 2005, a similarly lengthy survey (also including a citizenship question) that is sent to one in 38 households annually. *Id.*

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[4] U.S. Census Bureau, *History of the 1997 Economic Census* (July 2000), at 63, https://www.census.gov/history/pdf/1997econhistory.pdf.

[5] J. David Brown, et al., Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census (June 2019), at Table A8, https://www2.census.gov/ces/wp/2018/CES-WP-18-38R.pdf (noting the use of Social Security records after the 2000 Census).

These surveys did not, and do not, provide perfect citizenship data. For example, because the ACS is based on a sample of the population, its citizenship data is not available at the lowest geographic level, called a "census block" and roughly equivalent to a city block. *See id.* (discussing census blocks). Instead, ACS-based citizenship data is only reported at a higher geographic level (called a "census block group"), containing about 600 to 3,000 people. *See id.* (discussing census block groups). While the Census Bureau is statutorily obligated to produce *population* data for States and localities to use in redistricting (so-called Public Law 94-171 data), it also provides citizen voting age population by race and ethnicity (CVAP) data tabulated from the ACS.[6] 13 U.S.C. § 141(c); FAC ¶ 39. Population totals are reported at the census-block level; CVAP data is not. *Kravitz*, 366 F. Supp. 3d at 692–93.

In December 2017, the Department of Justice sent a letter to the Census Bureau requesting a citizenship question on the 2020 Census, which would enhance Voting Rights Act enforcement by allowing the Census Bureau to calculate citizenship data at the census-block level. *Id.* at 698. In March 2018, the Secretary of Commerce issued a memorandum directing the Census Bureau to include a citizenship question on the 2020 Census. *Id.* at 693.

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[6] *See* U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity (CVAP)*, https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html.

Various parties—including two organizations and one individual in this case—challenged the Secretary's decision. *Id.* at 691. Throughout the year-long litigation, the plaintiffs consistently and forcefully argued that the Secretary's so-called Alternative C—collecting citizenship data using administrative records—was "objectively superior" to employing a citizenship question on the 2020 Census.[7] The issue eventually reached the Supreme Court, which vacated and remanded the Secretary's decision on other grounds. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570–75 (2019).

II. The Executive Order to Continue Gathering Citizenship Data Using Administrative Records

Several weeks after the Supreme Court's decision, the President issued Executive Order 13880. While noting the Supreme Court's holding that "the Department of Commerce [ ] may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census," the President explained that "[t]he Court's

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[7] *See, e.g.*, Pls.' Corrected Conclusions of Law, *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. Feb. 18, 2019), ECF No. 151-2 at ¶ 129 ("The uncontroverted evidence before the Secretary demonstrated that the use of [administrative records] alone without a decennial Census citizenship question—Alternative C—was superior to [including a citizenship question] by every relevant metric, including those that the Secretary purported [ ] to value."); *id.* ¶ 178 ("[T]he only reasonable conclusion to be drawn from the [administrative record] is that Alternative C would yield more accurate citizenship data than [including a citizenship question], with no compromise of timeliness, scope, or other criteria of quality relevant to DOJ's stated use."); Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J., *LUPE v. Ross*, No. 18-cv-1570 (D. Md. Nov. 27, 2018), ECF No. 85 at 34–41, 44 (arguing that "all evidence from the Census Bureau points out that [including the citizenship question] is less accurate and more costly" than Alternative C).

ruling . . . has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." E.O. 13880, 84 Fed. Reg. at 33821. Nonetheless, the President sought to "ensure that accurate citizenship data is compiled," with the "goal of making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population." *Id.* at 33822.

This is important, the President explained, to "help us understand the effects of immigration on our country," to "implement specific [public-benefits] programs and to evaluate policy proposals for changes in those programs," and to "generate a more reliable count of the unauthorized alien population in the country." *Id.* The President also noted that "the Supreme Court left open the question whether 'States may draw districts to equalize voter-eligible population rather than total population,'" but "because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." *Id.* at 33823 (citing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)). Among other helpful aspects, "a more accurate and complete count of the citizen population" derived from administrative records would enable the Census Bureau to produce a CVAP tabulation at the lowest geographic level (the census block), unlike recently available CVAP tabulations derived solely from the ACS. *See id.* at 33824.

By the time of the Executive Order, the Census Bureau had enough administrative records to "determine citizenship status for approximately 90 percent of the population,"

but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies." *Id.* at 33821. "[T]o eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department," the President directed "all executive departments and agencies" to "provide the Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country," including "by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." *Id.* The President also established an "interagency working group to improve access to administrative records," and directed "the [Commerce] Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship." *Id.* at 33822.

III. Plaintiffs' Challenge

Plaintiffs now take issue with the exact decision some of them previously desired—the use of administrative records to gather citizenship data. Their lawsuit stems from a purported concern that if the Census Bureau "provides [Plaintiffs'] states with citizenship data to be used along with the total population tabulations in the P.L. 94-171 Redistricting Data File," these States may "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021." FAC ¶ 87.

On the merits, Plaintiffs overlook the Secretary's decades of gathering administrative records to allege that the mere collection of citizenship data from federal and state agencies is now part of a conspiracy "motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶¶ 110–17. For that reason, and alleged violations of the APA, Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31. This motion follows.

LEGAL STANDARDS

In evaluating a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court must "accept as true the allegations for which there is sufficient factual matter to render them plausible on their face." *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 620 (4th Cir. 2018) (alterations and citations omitted). But the Court need not do the same for "legal conclusion[s] couched as [ ] factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). So, to survive a Rule 12(b)(1) motion to dismiss, Plaintiffs must establish this Court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Similarly, to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The mere recital of elements of a cause of action, supported only by conclusory statements, is not sufficient to survive a motion made pursuant to Rule 12(b)(6)." *K.M. by & Through C.M. v. Bd. of Educ. of Montgomery*, 2019 WL 330194, at *3 (D. Md. Jan. 25, 2019) (Xinis, J.) (quoting *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012)).

ARGUMENT

I. Plaintiffs Lack Standing

Article III of the Constitution limits the judicial power of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "[R]ooted in the traditional understanding of a case or controversy," standing doctrine developed to implement this Article III command. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," thus preventing "the judicial process from being used to usurp the powers of the political branches" and "confin[ing] the federal courts to a properly judicial role." *Id.*

Standing "requires an injury in fact that is caused by the challenged conduct and is likely to be redressed by a favorable decision." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 405 (4th Cir. 2019). As the parties invoking this Court's jurisdiction, Plaintiffs bear the burden of establishing these requirements. *Spokeo*, 136 S. Ct. at 1547. They cannot. Plaintiffs claim that they "live in states where lawmakers have expressed an interest and desire to use CVAP as a population base for drawing congressional and

state legislative redistricting plans in 2021." FAC ¶ 87. If the Census Bureau "provides those states with citizenship data," the state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally overpopulated districts." *Id.* This theory fails every prong of standing.

A. Plaintiffs' purported harm is not traceable any action of Defendants and not redressable by the Court.

Most obviously, Plaintiffs fail to demonstrate traceability and redressability. Standing requires Plaintiffs to show that their purported injury is "fairly traceable to the challenged action of the defendant[s], and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations and citations omitted). This is important because "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation marks and citations omitted). Here, it is only "independent action of some third party not before the court"—States and localities using redistricting data—that could possibly cause Plaintiffs' alleged redistricting injury, and no court order is likely to redress that injury.

For starters, Plaintiffs' claimed injury could only occur if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But that redistricting choice is, quite obviously, an independent decision by state and local officials. The Supreme Court has

explained in no uncertain terms that "[r]edistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "[t]he decision to include or exclude" noncitizens and other non-voting persons "involves *choices* about the nature of representation with which we have been shown no constitutionally founded reason to interfere," *Burns v. Richardson*, 384 U.S. 73, 92 (1966) (emphasis added). The possibility that "*States* may draw districts to equalize voter-eligible population rather than total population" was explicitly left open in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (emphasis added). And "because eligibility to vote depends in part on citizenship, *States* could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 18880, 84 Fed. Reg. at 33824 (emphasis added). Nothing in either law or Plaintiffs' factual allegations supports the idea that States' redistricting methodologies are anything but their own independent decisions.[8]

[8] It is true that traceability may be found "where the plaintiff suffers an injury that is produced by the determinative or coercive effect of the defendant's conduct upon the action of someone else." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne*, LLC, 713 F.3d 187, 197 (4th Cir. 2013) (alterations omitted). But Plaintiffs do not (and cannot) advance any allegations that Defendants' mere collection of citizenship data somehow coerces States into using that data for CVAP redistricting, or somehow makes CVAP redistricting a foregone conclusion. As Plaintiffs themselves acknowledge, States and localities expressed a desire for CVAP redistricting long before the Executive Order. *See, e.g.*, FAC ¶ 87 n.42; Brief for Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (State of Texas arguing for voter-eligible redistricting in 2015); Brief Amicus Curiae of Tennessee State Legislators and the Judicial Education Project in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940) (Tennessee legislators arguing for voter-eligible redistricting in 2015).

This alone is fatal to Plaintiffs' standing. *See Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011) (stating that "a fundamental tenet of standing doctrine" is that where a third party "makes the independent decision that causes an injury, that injury is not fairly traceable" to the defendant). But even if States make the independent choice to use CVAP for redistricting, they must also make the independent choice to use citizenship data *provided by the Census Bureau*, as opposed to other statistics like voter-registration data. *See Burns*, 384 U.S. at 92–93 (permitting a State to draw districts based on voter-registration data).[9] So before Plaintiffs could possibly suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts," States must make two independent decisions: (i) whether to "exclu[de] [ ] non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," and (ii) whether to use "citizenship data" provided by the Census Bureau "along with the total population tabulations in the P.L. 94-171 Redistricting Data File." FAC ¶ 87.

That is also why a favorable decision in this case would do nothing to relieve Plaintiffs' theoretical "injury." *Lujan*, 504 U.S. at 560. Plaintiffs seek to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31.

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[9] More broadly, States make the independent choice to use any Census Bureau data, even total population figures, for redistricting. *See Burns*, 384 U.S. at 91 ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

But even if they are granted this relief, States may nonetheless choose to use CVAP for redistricting based on either voter-registration data or the Census Bureau's ACS-based citizenship data.[10] The reverse is also true. Even if this Court declines Plaintiffs' requested injunction, it is entirely possible that States—or at least Arizona, Texas, and Washington, where Plaintiffs reside—may choose *not* to use CVAP for redistricting. In either case, Plaintiffs lack standing because "[f]ederal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (alterations and citations omitted).

Plaintiffs' quarrel lies with their respective States, not the President, the Secretary of Commerce, or the Census Bureau. Merely collecting citizenship data and potentially providing it to the States cannot have the challenged effect on redistricting unless *States* decide to use CVAP for redistricting. And if they do so for discriminatory purposes, Plaintiffs could sue their respective States (or the relevant State officials). *See Davidson v. City of Cranston*, 837 F.3d 135, 142–43 (1st Cir. 2016); *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 363 (M.D. La. 2015); *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 267 (D.D.C. 2002); *Common Cause S. Christian*

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[10] As experienced demographers told the Supreme Court in 2015, "ACS data more than suffices as the raw material for building districts of 'substantially equal' numbers of eligible voters." Brief of Demographers Peter A. Morrison, et al. as Amici Curiae in Support of Appellants, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001). In the meantime, Plaintiffs may seek relief through the political process—not the courts—if they dislike the collection of citizenship data through administrative records.

B. Plaintiffs' purported harm is far from certainly impending.

Plaintiffs also fail the injury-in-fact inquiry because no one is injured by the Defendants' mere collection of citizenship data; Plaintiffs' hypothetical injury could only occur, if ever, after a series of speculative events. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548. The purpose of the imminence requirement "is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). So the "threatened injury must be *certainly impending* to constitute injury in fact, and allegations of *possible* future injury are not sufficient." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 207–08 (4th Cir. 2017) (alterations omitted) (quoting *Clapper*, 568 U.S. at 409). Plaintiffs have alleged just such a "possible future injury" here.

Plaintiffs claim that if the Census Bureau "provides th[eir] states with citizenship data," state and local officials may exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts," purportedly resulting in Plaintiffs' "vote dilution and loss of representation in unconstitutionally

overpopulated districts." FAC ¶ 87. So Plaintiffs will not suffer any harm unless (1) Defendants collect more administrative records under the Executive Order, *id.* ¶¶ 59–62; (2) the Census Bureau is able to "produce citizenship population tabulations" using these additional administrative records, *id.* ¶¶ 96, 101, 103, 108, 112; (3) the Census Bureau provides "[S]tates with citizenship data" based on administrative records, *id.* ¶ 87; (4) States choose to "use CVAP as a population base for drawing congressional and state legislative redistricting plans in 2021," *id.*; and (5) States choose to use the Census Bureau's administrative-record data to do so. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410.

First, until the Census Bureau is able to obtain administrative records under the Executive Order, the precise effect of additional records remains unknown. As the Executive Order itself notes, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population," but "remain[ed] in negotiations to" access "several additional important sets of records with critical information on citizenship" from other federal agencies. E.O. 13880, 84 Fed. Reg. at 33821–22. The acquisition of administrative records from federal agencies is a complicated process. It requires extensive negotiation of a lengthy agreement, including how the data will be transferred, how the data may be used, how the data must be protected, how long the Census Bureau may retain the data, and how much the data will

cost. And this says nothing about Defendants' acquisition of *state* administrative records, which are comparably more difficult to obtain because they not only require the same extensive negotiation as federal agreements, but require these negotiations with each separate State (and sometimes multiple state agencies with the same State). Plaintiffs seek to enjoin only the speculative acquisition of administrative records obtained under the Executive Order, not any preexisting administrative records. *See* FAC at 31 (seeking to "[e]njoin Defendants and their agents from collecting data as dictated by EO 13380").[11]

Second, even if additional administrative records are acquired, they may be too unreliable to aid production of "citizenship population tabulations" by April 2021. *See id.* ¶¶ 87, 96, 101, 103, 108, 112. The Census Bureau can only produce these tabulations—including the number and location of citizens and noncitizens—when administrative records and their connections to census data are both of "high quality." *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 587–88 (S.D.N.Y.) (noting that administrative

[11] Although Plaintiffs seemingly seek a declaratory judgment "that production of citizenship data for use along with the P.L. 94-171 Redistricting Data File and population tabulations, or including citizenship data in the File, violates the Equal Protection guarantee of the Fifth Amendment," FAC at 31, they nowhere allege facts supporting the unprecedented relief of declaring that all citizenship data—not just citizenship data collected under the Executive Order—is invalid on equal protection grounds. In fact, the only allegations of discriminatory intent (necessary for an equal protection violation) focus on the Secretary's previous attempt to include a citizenship question on the census and the subsequent Executive Order, not any preexisting animus somehow infecting administrative records collected years ago. *See id.* ¶¶ 73–84. In any event, Plaintiffs claims are both unreviewable and meritless, as discussed above and below.

records "will be used to enumerate only a limited number of those households for which there is high quality administrative data about the household," and that "[n]oncitizen and Hispanic households are less likely to be accurately represented in quality administrative records than other groups"), *aff'd in part, rev'd in part* 139 S. Ct. 2551 (2019). Plaintiffs themselves fully acknowledge the possibility of gaps in administrative records. *See* FAC ¶¶ 66–72 (cataloguing shortcomings of administrative records and noting that the Census Bureau "will most likely never possess a fully adequate truth deck" for citizenship). So the usability of any administrative records collected under the Executive Order is still unknown.[12]

Third, even if the Census Bureau is able to gather administrative records under the Executive Order, and even if they prove reliable enough to "produce citizenship population tabulations," the methodology used to produce any citizenship data provided to States is still undetermined.[13]

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[12] The usability and completeness of citizenship data in Defendants' administrative records is currently being litigated. *See* Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 42–51 (contesting the use of "data collected under EO 13880" for congressional apportionment because it "is not an enumeration of individuals, and specifically is not an enumeration of undocumented immigrants, in the U.S.").

[13] U.S. Census Bureau, *Update on Disclosure Avoidance and Administrative Data* (Sept. 13, 2019), at 13, https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf? ("No final decisions have been made regarding the methodology and format of the block-level CVAP data.").

Fourth and fifth, it is anyone's guess as to whether state and local officials will make the independent decisions to both use CVAP for redistricting and use the Census Bureau's (as-yet-unknown) data in the process. As explained above, it is entirely possible that Plaintiffs' States and localities may choose to redistrict using total population, or to use voter-registration data for CVAP redistricting.

Plaintiffs build speculation on top of speculation in a feeble attempt to manufacture a redistricting injury from Defendants' mere collection of administrative records. The result is a "highly attenuated chain of possibilities," which "does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. No redistricting harm may ever befall Plaintiffs, let alone redistricting harm traceable to Defendants' conduct and redressable by the Court.

C. Plaintiffs will suffer no injury to a legally protected interest.

Plaintiffs' sole alleged redistricting injury is that they will suffer "vote dilution and loss of representation in unconstitutionally overpopulated districts" if state and local officials exclude "non-citizens from the population base used for redistricting congressional, state legislative[,] and local districts." FAC ¶ 87. But standing requires Plaintiffs to show that they will suffer "an invasion of a *legally protected* interest." *Wikimedia*, 857 F.3d at 207–08 (emphasis added) (quoting *Spokeo*, 136 S.Ct. at 1548). And despite Plaintiffs' cursory assertion that CVAP redistricting is itself "unconstitutional[]," that is simply not true under current law. FAC ¶ 87.

The Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population," and it has suggested that States may constitutionally redistrict on either basis. *Evenwel*, 136 S. Ct. at 1126–32 (total population); *Burns*, 384 U.S. at 90 (registered-voter population). Indeed, "[i]t has long been constitutionally acceptable, but by no means required, to exclude non-voting persons . . . from the apportionment base, so long as the apportionment scheme does not involve invidious discrimination." *Davidson*, 837 F.3d at 143 (quoting *Burns*, 384 U.S. at 92); *Kaplan v. Cty. of Sullivan*, 74 F.3d 398, 401 (2d Cir. 1996) (same). So the mere use of CVAP in redistricting does not cause "vote dilution and loss of representation in unconstitutionally overpopulated districts." FAC ¶ 87.[14] It is only when Plaintiffs' state and local officials choose to use CVAP *with discriminatory intent* that Plaintiffs will suffer

[14] Plaintiffs also point out that "[e]xclusion of non-citizens from the population count used for [congressional] apportionment creates a significant risk that states in which large numbers of non-citizens reside, including Texas and Arizona, will suffer a reduction in the number of congressional seats that would otherwise be apportioned to them." FAC ¶ 86. But Defendants do not understand Plaintiffs to be asserting an injury on this basis because they advance no allegation, nor could they, that Defendants will use citizenship data collected under the Executive Order to exclude noncitizens in congressional apportionment. If Plaintiffs were to rely on that theory for standing, however, Defendants would likely seek to transfer venue to the Northern District of Alabama where that issue is currently being litigated. *See* First Am. Compl., *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Sept. 10, 2019), ECF No. 112 at ¶¶ 1–4 (alleging that *inclusion* of noncitizens in congressional apportionment is unconstitutional); Defendant-Interveners' Cross Claim, *Alabama v. U.S. Dep't of Commerce*, No. 18-cv-0772 (N.D. Ala. Oct. 1, 2019), ECF No. 119 at ¶¶ 50—56 (alleging that *exclusion* of noncitizens in congressional apportionment based on administrative records is unconstitutional).

a legally cognizable injury. *Davidson*, 837 F.3d at 143; *Kaplan*, 74 F.3d at 401. And, as explained above, Plaintiffs may attempt to enjoin such conduct by suing their state and local officials, not Defendants who merely tabulated citizenship data.

D. Organizational Plaintiffs lack standing.

In addition the infirmities identified above, the Organizational Plaintiffs have other standing problems: suing on behalf of their members or on their own behalves.

An organization does not have Article III standing to sue on behalf of its members unless "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). A general reference to unidentified members is insufficient for organizational standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982); *see also Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006). Here, Promise Arizona (PAZ) does not identify a single member who may suffer an injury. *See* FAC ¶¶ 6–14. And although La Unión del Pueblo Entero (LUPE) identifies one member (Plaintiff Juanita Valdez-Cox) who may hypothetically suffer an injury, she—and therefore LUPE—still lack standing for the reasons explained above. *Id.*

When an organization sues on its own behalf (rather than on behalf of its members), it must satisfy the same Article III standing requirements that apply to individuals. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). But Organizational Plaintiffs do not even attempt to allege any injuries distinct from their

members, like a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 379.

II. Plaintiffs' Claims Are Not Ripe

Ripeness "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199 (4th Cir. 2019) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In that sense, "[a]nalyzing ripeness is similar to determining whether a party has standing." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (quoting *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006)). Just as Plaintiffs "cannot assert standing based on an alleged injury that lies at the end of a highly attenuated chain of possibilities," Plaintiffs' "claim is not ripe for judicial review if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (citations omitted).

"The question of whether a claim is ripe turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citations omitted). Neither factor favors Plaintiffs. "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; *Johnston v. Lamone*, 401 F. Supp. 3d 598, 607 (D. Md. 2019). Here, as explained above, the action in controversy—redistricting based on CVAP—is far from final and entirely dependent on unknown facts underlying a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, including

States' independent redistricting decisions. *See Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court.").

"The hardship prong [of ripeness] is measured by the immediacy of the threat and the burden imposed on" Plaintiffs. *Miller*, 462 F.3d at 319. By Plaintiffs' own admission, the Census Bureau would not provide citizenship data to the States—whether based on administrative records or the ACS—until April 2021. *See* FAC ¶¶ 1, 15, 65, 87. And as explained above, it is far from certain that Plaintiffs would suffer any redistricting harm whatsoever. But perhaps more importantly, there is no burden on Plaintiffs at all. Cases have been deemed ripe where, for example, a "challenged statute imposed a continuing injury on [plaintiffs'] associational rights," *Miller*, 462 F.3d at 319–20, or a challenged "policy impose[d] the heavy burden of requiring a pit bull owner to either vacate his or her home or abandon a family pet," *Weigel v. Maryland*, 950 F. Supp. 2d 811, 830 (D. Md. 2013), or a challenged policy forced "harmful consequences [for plaintiffs] such as the cancellation and postponements of surgeries" and "the prospect of discharge [from the military] and inability to commission as an officer," *Stone v. Trump*, 280 F. Supp. 3d 747, 767 (D. Md. 2017). In stark contrast, Defendants' collection of administrative records, facilitated by the Executive Order, neither obligates Plaintiffs to, nor prohibits Plaintiffs from, any action. This case is not ripe and it should be dismissed.

III. Plaintiffs' APA Claims Should be Dismissed

Plaintiffs seem to target their APA claims at the Executive Order, and they challenge the Secretary's compliance with this presidential directive. FAC ¶¶ 88–109; *see, e.g.*, *id.* ¶ 103 ("Defendant Ross's decision to follow EO 13380 and direct the Census Bureau to, among other things, collect citizenship data . . . violates the APA and must be set aside."). But "[i]t is firmly established that presidential action is not subject to APA review." *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 662 (D. Md. 2019) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

It is true that, in certain circumstances, courts may apply the APA to an *agency's implementation* of an executive order. *See U.S. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) ("Appellants could not possibly have relied on the APA for a cause of action prior to the Secretary's issuance of regulations implementing the Executive Order."); *Serv. Emps. Int'l Union Local 200 v. Trump*, 2019 WL 4877273, at *7 (W.D.N.Y. Oct. 3, 2019) (collecting cases for the proposition that "an APA challenge to an agency's implementation of an executive order (or other presidential directive) is not permissible prior to some independent, concrete action by the agency"). For at least two reasons, however, that gets Plaintiffs no closer to an actionable APA claim.

First, the Executive Order was merely a managerial tool designed "to eliminate delays and uncertainty, and to resolve any doubt about the duty of agencies to share data promptly with the [Commerce] Department." E.O. 13880, 84 Fed. Reg. at 33822. It was

not "issued pursuant to statutory mandate" or "a delegation from Congress of lawmaking authority." *U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988). To the contrary, it was "intended for the internal management of the President's cabinet," so neither the Executive Order nor its implementation are reviewable by courts. *Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995); *see U.S. Dep't of Health & Human Servs.*, 844 F.2d at 1095; *Orbital ATK, Inc. v. Walker*, 2017 WL 2982010, at *9 (E.D. Va. July 12, 2017) (rejecting an APA challenge where the presidential directive at issue was "intended primarily as a managerial tool for implementing the President's personal [ ] policies" (quoting *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235–36 (8th Cir. 1975))).

Second, given that the Executive Order is simply managerial, it is unsurprising that Plaintiffs do not challenge a cognizable "agency action." The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. "The term 'action' as used in the APA is a term of art that does not include all conduct on the part of the government." *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013)). Cognizable "agency action" under the APA must satisfy two key criteria: it must be "circumscribed and discrete," and it must "determine rights and obligations." *Id.* at 431 (citations and alterations omitted).

The latter requirement "ensures that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties." *Id.* "To meet this requirement, a party must demonstrate that the challenged act had an immediate and practical impact, or altered the legal regime in which it operates." *Id.* (citations and alterations omitted). "It is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the 'independent responses and choices of third parties,' or mere 'coercive pressures.'" *Id.* (citation omitted). The collection of administrative records fails this test.

Indeed, Plaintiffs' APA claims are the paradigmatic example of improperly "reach[ing] into the internal workings of the government." *Id.* The Executive Order simply seeks to "ensure that accurate citizenship data is compiled" from administrative records already held by federal and state agencies. *See* E.O. 13880, 84 Fed. Reg. at 33821 (ordering "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country"). It has no impact whatsoever on private parties, let alone an "immediate and practical" one. *See City of New York*, 913 F.3d at 431.

The Court need look no further than the recent challenges to the 2020 Census to understand this point. In those cases, plaintiffs challenged the Secretary's decision to include a citizenship question on the 2020 Census, arguing that it violated the

Constitution and the APA. *See, e.g.*, *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381 (D. Md. 2018). Moving to dismiss plaintiffs' APA claims, the government acknowledged that the Secretary's decision was "final agency action." *See, e.g.*, *New York*, 351 F. Supp. 3d at 627 ("There is no dispute th[at] Secretary Ross's decision constitutes 'final agency action' reviewable under the APA."). That was because the Secretary's decision imposed an obligation on private parties—*i.e.*, U.S. residents—to truthfully answer the citizenship question in 2020. *See* 13 U.S.C. § 221. Here, in contrast, Defendants' collection of administrative records from other federal and state agencies do not obligate private parties to do anything. *See NAACP v. Bureau of the Census*, 399 F. Supp. 3d 406, 425 (D. Md. 2019) (rejecting APA challenges to the Census Bureau's plans to conduct the 2020 Census because they did not determine rights and obligations of private parties).

It also cannot be said that the Executive Order "alter[s] the legal regime in which it operates." *City of New York*, 913 F.3d at 431 (citations omitted). It neither dictates how the Census Bureau must use the administrative records once they are collected, nor is anyone exposed to civil or criminal penalties for failing to follow it. *Cf. Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that the legal regime is altered by one agency's determination when the action agency would expose itself to civil and criminal penalties if it disregarded that determination); *see Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002) (holding that an EPA Report did not alter the legal regime because "no statutory scheme triggers potential civil or criminal penalties for

failing to adhere to the Report's recommendations"). Beyond ordering "*all executive departments and agencies*"—not private parties—to "provide the [Commerce] Department the maximum assistance permissible," *see* E.O. 13880, 84 Fed. Reg. at 33821 (emphasis added), the Executive Order in no way "determine[s] rights and obligations" for the Department of Commerce, the Census Bureau, other federal agencies, Plaintiffs, or anyone else.

The Supreme Court's decision in *Franklin v. Massachusetts* alone resolves this case. 505 U.S. 788 (1992). There, plaintiffs challenged the Secretary's *use of administrative records* to count federal employees serving overseas, arguing that the Secretary's tabulation of census results violated the APA. *Id.* at 794–96 (explaining that the Census Bureau used the "home of record" in the Department of Defense's personnel files to allocate individuals). Strikingly, the Supreme Court held that the Secretary's final report to the President conveying the census results did not constitute "final agency action" because "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President." *Id.* at 797. So if the Secretary's tabulation of final census results—*including* administrative records—is not "final agency action" under the APA, then the mere gathering of administrative records parallel to the census cannot constitute "final agency action" either.

Fourth Circuit law reinforces this point, consistently rejecting APA claims like those at issue here. *City of New York*, 913 F.3d at 434–35 (holding that the Department of Defense's compliance with statutory requirements was not "agency action" under the APA because it did not "in any way determine [the plaintiffs'] rights and obligations"); *Bald Head Island*, 714 F.3d at 188–93 (finding no "agency action" where plaintiffs "commenced [the] action to challenge the adequacy of [a project's] performance and to require the [Army Corps of Engineers] to do what it had undertaken to do when approving the project," which was not a "determination of rights and obligations"); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 427–28 (4th Cir. 2010) (discussed below); *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (holding that the Patent and Trademark Office's advertising campaign was not "final agency action" because it "was not the consummation of any decisionmaking process that determined rights or obligations or from which legal consequences flowed"); *Flue-Cured Tobacco*, 313 F.3d at 861 (holding that publication of an EPA report that classified environmental tobacco smoke as a potentially harmful human carcinogen was not an "agency action" reviewable under the APA).

In *Golden & Zimmerman, LLC v. Domenech*, for example, the plaintiffs challenged the "Federal Firearms Regulations Reference Guide 2005,' which [was] published by the Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') to provide information designed to help licensees comply with all of the laws and regulations governing the

manufacture, importation, and distribution of firearms and ammunition." 599 F.3d at 427–28 (alterations omitted). The court rejected this challenge because, although the Reference Guide "inform[ed] the regulated community of what violates the law," it did "not itself *determine* the law or the consequences of not following it." *Id.* at 432–33. Notably, the court explained, "if the ATF had never published the Reference Guide . . . the ATF would still have had the authority to prosecute licensees for engaging in the conduct described in [it] because legal consequences do not emanate from [the Reference Guide] but from the Gun Control Act and its implementing regulations." *Id.* at 433.

The Executive Order here is even further removed from "determin[ing] the law" than the Reference Guide in G*olden & Zimmerman*: it provides no information to "the regulated community of what violates the law," *id.* at 432–33, but merely functions as an internal guide for "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible, consistent with law, in determining the number of citizens and non-citizens in the country." *See* E.O. 13880, 84 Fed. Reg. at 33821. Surely, if a Reference Guide explaining the law to regulated parties does not "determine rights and obligations," then neither does the President's managerial decision. And, like the Reference Guide in G*olden & Zimmerman*, Defendants can, and have, gathered administrative records *without* the President's recent directive. *See id.* 33821–22 (noting that the Census Bureau already had administrative records to "determine citizenship status for approximately 90 percent of the population"). Their

authority to do so derives from the Census Act, not a recent directive "to eliminate delays and uncertainty" in the process. *See* 13 U.S.C. § 6(a) ("The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government . . . for information pertinent to the work provided for in this title."); E.O. 13880, 84 Fed. Reg. at 33821–22 ("[T]o to eliminate delays and uncertainty . . . I am hereby ordering all agencies to share information requested by the Department to the maximum extent permissible under law.").

Plaintiffs are clearly concerned about the conduct of States and localities when they receive citizenship data from the Census Bureau in 2021. *See* FAC ¶¶ 1, 15, 65, 87. But the APA "does not provide judicial review for everything done by an administrative agency," *Invention Submission Corp.*, 357 F.3d at 459 (citation omitted), and "[i]t is not enough for plaintiffs to simply identify a governmental action that ultimately affected them through the independent responses and choices of third parties," *City of New York*, 913 F.3d at 431 (citations omitted). Managerial "policy statements," like the Executive Order, "are properly challenged through the political process and not the courts." *Invention Submission Corp.*, 357 F.3d at 459.

IV. Plaintiffs' Equal Protection Claim Should be Dismissed

Plaintiffs' equal protection claim alleges that "[t]he collection of citizenship data and the production of citizenship population tabulations for use along with the P.L. 94-171 Redistricting Data File violates the equal protection guarantee of the Fifth

Amendment because it is motivated by racial animus towards Latinos, and animus towards non-U.S. citizens and foreign-born persons." FAC ¶ 112. To state an equal protection claim,[15] Plaintiffs must plausibly allege that the decision at issue has an adverse effect on a protected group and was motivated by discriminatory animus. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *La Union del Pueblo Entero*, 353 F. Supp. 3d at 393. They fail both prongs.

As explained above, the mere collection of administrative records does not impact anyone, let alone disparately impact Plaintiffs. *See* Argument Section I., *supra*. The Executive Order is even explicit that its goal is to "mak[e] available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population," citizens and noncitizens alike. E.O. 13880, 84 Fed. Reg. at 33822. It is only when States and localities use citizenship data produced by the Census Bureau (sometime after April 2021, if ever) that Plaintiffs would be impacted. That alone resolves their equal protection claim. *See Feeney*, 442 U.S. at 272.

But even if Plaintiffs somehow alleged an adverse effect from the collection of administrative records, they fail to allege facts plausibly suggesting discriminatory intent for this collection. *Id.* at 274. Put simply, Plaintiffs have not met their burden of plausibly

[15] "Although the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, the Fifth Amendment's Due Process Clause contains an equal protection component." *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 233 (4th Cir. 2016), *cert. denied,* 137 S. Ct. 374 (2016).

alleging that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

The Supreme Court and the Fourth Circuit have identified various factors that may be probative of whether a decisionmaker was motivated by discriminatory intent:

> (1) evidence of a "consistent pattern" of actions by the [decisionmaker] disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the [decisionmaker] . . . ; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by [the decisionmaker] on the record or in minutes of [ ] meetings.

Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 635 (4th Cir. 2016) (quoting S*ylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 819 (4th Cir. 1995)). None of these factors favor Plaintiffs.

First, Plaintiffs have not plausibly alleged a "consistent pattern" of actions by *anyone* that disparately impacted Latinos, noncitizens, and foreign-born persons.[16] They

[16] Plaintiffs cannot maintain an equal protection claim based on "animus towards non-U.S. citizens and foreign-born persons," FAC ¶ 112, because they are not suspect classifications. The federal government makes many distinctions between citizens and noncitizens, both for privileges (such as voting, jury service, and eligibility for benefits) and for immigration laws. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001); *Moving Phones P'ship L.P. v. FCC*, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993). In any event, Plaintiffs have not set forth plausible allegations of discriminatory animus toward any of their named groups.

name only one incident, Defendants' failed inclusion of a citizenship question on the 2020 Census, as the touchstone of discriminatory motivation here. *See* FAC ¶¶ 73–84. But one event can hardly be called a "consistent pattern," especially because the attempt to include a citizenship question was enjoined and could not possibly have "disparately impact[ed] members of a particular class of persons." *Cent. Radio*, 811 F.3d at 635.

Regardless, even their allegations of that one incident are lacking. The proverbial smoking gun cited for discriminatory intent is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from redistricting based on total population to CVAP." FAC ¶ 81 ("To generate the necessary CVAP data and achieve this goal of diluting Latino representation while increasing over-representation of non-Latino Whites, Dr. Hofeller concluded that a citizenship question must be added to the 2020 census."). But there are no allegations that the sole decisionmaker with statutory authority to add a citizenship question—*i.e.*, the Secretary, *see* 13 U.S.C. § 141(f)(2)—ever read, received, or was even aware of Dr. Hofeller or his supposedly incendiary documents.[17] And those deficient allegations are still significantly

[17] At most, Plaintiffs allege that Dr. Hofeller "drafted and gave to Commerce and DOJ officials . . . the substantive content of the December 2017 DOJ letter requesting the addition of the citizenship question." FAC ¶ 82. Their allegations say nothing about the "substantive content of the December 2017 DOJ letter" including his idea to "shift from redistricting based on total population to CVAP," *id.* ¶ 81, or whether the "Commerce and DOJ officials," *id.* ¶ 82, were even aware of Dr. Hofeller's findings, let alone that they shared Dr. Hofeller's supposed motive to use CVAP redistricting for *discriminatory* purposes.

removed from any action at issue in this case: the Secretary's collection of administrative records, and the President's facilitation of that process. So none of Plaintiffs' allegations, FAC ¶¶ 73–84, shed any light on "the decisionmaker's purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Second and relatedly, the FAC says nothing about a discriminatory historical background surrounding any action at issue in this case. Again, the FAC's equal protection claim rests solely on insufficient allegations related to a census citizenship question, not the collection of administrative records. Plaintiffs identify no "history of discrimination by the [decisionmaker]" relevant to determining "the decisionmaker's purposes" in collecting administrative records or expediting that process. *Id.* at 267; *Cent. Radio*, 811 F.3d at 635.

Third, Plaintiffs fail to plausibly allege any departures from normal procedures such that discriminatory intent could be inferred. As explained above, the Secretary of Commerce has the statutory authority to collect data from other agencies. *See* 13 U.S.C. § 6(a). Secretaries of Commerce have long exercised this statutory authority to gather administrative records, including those on citizenship. And by the time of the Executive Order, Defendants *already had* administrative records to "determine citizenship status for approximately 90 percent of the population." E.O. 13880, 84 Fed. Reg. at 33821–22. While Plaintiffs make oblique references to generally applicable standards of Office of Management and Budget Policy Directives, the Paperwork Reduction Act, and the

Information Quality Act, *see* FAC ¶¶ 26–31, they nowehere explain how those guidelines apply to the collection of administrative records, how this collection violated any of those guidelines, or how the Secretary's current collection of administrative data differs from the procedures used for the last century.

Fourth, Plaintiffs do not advance any plausible allegations of "contemporary statements by [the decisionmaker]" from which discriminatory intent could be inferred. *Cent. Radio*, 811 F.3d at 635. For example, Plaintiffs cite the President's statements that the Executive Order will help "generate[] an accurate count of how many citizens, non-citizens, and illegal aliens are in the United States of America," and that citizenship data may be used by some States who "may want to draw state and local legislative districts based upon the voter-eligible population." FAC ¶¶ 62–63. Both of those sentiments were clearly expressed in the text of the Executive Order. *See* E.O. 13880, 84 Fed. Reg. at 33821–22 (noting the goal of "making available to the [Commerce] Department administrative records showing citizenship data for 100 percent of the population"); *id.* at 33823 (noting that citizenship data may allow "States to design State and local legislative districts based on the population of voter-eligible citizens"). And a discriminatory purpose cannot be inferred from either. Again, Secretaries of Commerce have long collected administrative records, including those on citizenship. And the Supreme Court explicitly left open the possibility for States to "draw districts to equalize voter-eligible population rather than total population." *Evenwel*, 136 S. Ct. at 1133. As the Executive Order explains, "because

eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population." E.O. 13880, 84 Fed. Reg. at 33823. So, again, none of Plaintiffs' allegations raise a plausible inference of discriminatory motive to collect administrative records—a collection that some of these Plaintiffs previously advocated.

Whether examined individually or collectively, through the lens of the Fourth Circuit's factors or not, the FAC contains no facts plausibly suggesting that discriminatory intent motivated any action at issue. Plaintiffs' equal protection claim should be summarily rejected.

V. Plaintiffs' 42 U.S.C. § 1985(3) Claim Should be Dismissed

Plaintiffs also advance a claim under 42 U.S.C. § 1985(3), alleging that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to collect citizenship data and produce citizenship data for use along with the P.L. 94-171 Redistricting Data File so that states can use CVAP data to apportion state and local districts." FAC ¶ 115. This official-capacity claim fails on multiple threshold grounds and, in any event, fails to state a claim.

A. Section 1985 does not authorize courts to award injunctive relief.

Plaintiffs' conspiracy claim fails at the outset because § 1985 only authorizes courts to award damages, not the injunctive relief Plaintiffs seek here. *See id.* at 31–32 (prayer for relief). By its terms, § 1985(3) provides only that a plaintiff "may have an action *for*

the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). The statute says nothing about injunctive relief. In stark contrast, § 1985(3)'s companion provision, also enacted as part of the Ku Klux Klan Act of 1871, authorizes "action[s] at law, *suit[s] in equity*, or other proper proceeding[s] for redress." 42 U.S.C. § 1983 (emphasis added). As this comparison reveals, Congress both considered and authorized differing remedies under two statutory provisions of the same act: a violation of § 1983 may incur damages or injunction relief, while a violation of § 1985(3) can incur only damages. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Court should therefore conclude that "the statutory relief available under § 1985 'is limited to the recovery of damages'" and that, in requesting only injunctive relief, Plaintiffs' claim fails. *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 133 (E.D.N.Y. 1999) (quoting *Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986), *aff'd*, 229 F.3d 1136 (2d Cir. 2000).[18]

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[18] Neither the Supreme Court nor the Fourth Circuit have decided whether § 1985(3) authorizes injunctive relief. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 n.16 (1993). Two other circuits have indicated that injunctive relief is available under § 1985(3). *See Action v. Gannon*, 450 F.2d 1227, 1237–38 (8th Cir. 1971) (en banc); *Mizell v. N. Broward Hosp. Dist.*, 427 F.2d 468, 473 (5th Cir. 1970). Neither case is persuasive. *Action* simply relied on *Mizell*. And *Mizell* relied on dicta in *Jones v. Alfred H.*

B. Plaintiffs' § 1985(3) claim is barred by sovereign immunity.

Plaintiffs' § 1985(3) claim also fails because it is barred by sovereign immunity. Sovereign immunity prohibits cases against the federal government unless Congress has unequivocally consented to suit. *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity is not limited to cases naming the United States as a defendant; it also bars cases against federal officials in their official capacities because the relief requested would run against the federal government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). Civil rights statutes like 42 U.S.C. § 1985(3) do not waive the federal government's sovereign immunity. *Unimex, Inc. v. Dep't of Housing & Urban Dev.*, 594 F.2d 1060, 1061 (5th Cir. 1979). Sovereign immunity thus "bars []§ 1985(3) . . . suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000); *accord Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

While a § 1985(3) suit against federal officers in their *individual capacities* might be permissible if Plaintiffs alleged that the officers acted beyond their statutory powers and that the powers themselves, or their exercise, were constitutionally void, *see Dugan v.*

Mayer Co., 392 U.S. 409, 414 (1968), and on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238–40 (1969), both of which interpreted a statute (42 U.S.C. § 1982) that—unlike § 1985(3)—confers substantive rights without specifying a remedy. By contrast, § 1985(3) is solely remedial, *see United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983), and that remedy is limited to damages.

Rank, 372 U.S. 609, 621 (1963), Plaintiffs have sued Defendants only in their official capacities, FAC ¶¶ 15–16. So their § 1985(3) claim is barred by sovereign immunity.

C. Plaintiffs fail to state a claim under § 1985(3).

Even if Plaintiffs' § 1985(3) claim were viable, their allegations are entirely conclusory and fail to state a claim. To state an actionable conspiracy under § 1985(3), Plaintiffs must allege non-conclusory facts plausibly showing:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citation omitted). Plaintiffs also must adequately allege "an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights"—that is, a "joint plan[] to deprive [the plaintiff] of his constitutional rights." *Id.* at 1377. In applying these "very high" standards, *Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (unpublished), the Fourth Circuit "has rarely, if ever, found that a plaintiff has set forth sufficient facts to establish a section 1985 conspiracy," *Simmons*, 47 F.3d at 1377. No such "sufficient facts" can be found in the FAC.

As noted above, Plaintiffs' theory seems to be, in essence, that various individuals with discriminatory animus conspired to include a citizenship question on the 2020 Census. FAC ¶¶ 73–84. The purported proof of this conspiracy is a document of the late Dr. Thomas Hofeller, in which he noted inclusion of a citizenship question to "shift from

redistricting based on total population to CVAP." *Id.* ¶¶ 81, 83. Plaintiffs simply state that "[t]he same discriminatory motivation behind adding the citizenship question motivated Defendants" to seek citizenship information through administrative records. *Id.* ¶ 84. This does not come close to plausibly alleging a civil conspiracy under § 1985(3).

To begin, Plaintiffs have not alleged "an overt act committed by the defendants in connection with the conspiracy" that "results in injury to" them. *Simmons*, 47 F.3d at 1376. The only overt act Plaintiffs arguably allege is the Executive Order's facilitation of collecting citizenship data through administrative records. *Cf.* FAC ¶¶ 58, 84. But, as explained above, the mere collection of administrative records causes no harm to anyone, let alone Plaintiffs. *See* Argument Section I., *supra*.

Plaintiffs also do not attempt to allege any facts from which to infer "a specific class-based, invidiously discriminatory animus to" gather administrative records. *Simmons*, 47 F.3d at 1376. Instead, their allegations of discriminatory motive focus exclusively on the 2020 Census citizenship question; they say nothing about the motives for collecting administrative records. *See* Argument Section IV., *supra*; FAC ¶¶ 73–84.

That is fatal to not only § 1985's discriminatory-animus element, but also its meeting-of-the-minds element. *Simmons*, 47 F.3d at 1376. Plaintiffs explicitly note the purported conspirators of a discriminatory plot to include a citizenship question on the census. *See* FAC ¶ 73 ("Defendant Ross, members of the Trump Administration, A. Mark Neuman, then-Kansas Secretary of State Kris Kobach, members of the DOJ . . . and

Republican strategist Dr. Thomas Hofeller conspired to add a citizenship question to the 2020 census."). And they piece together disparate actions of these individuals in a convoluted attempt to demonstrate this plot and its underlying motivations. *See id.* ¶¶ 73–83 (alleging, for example, that "Defendant Ross . . . coordinated with AG Sessions, other members of the DOJ, and the White House to fabricate a 'need' for the citizenship question"). But setting aside the sufficiency of those allegations on their own terms, the FAC is utterly devoid of facts demonstrating that purported conspirators reached "an agreement" or a "meeting of the minds" on a "joint plan" to gather administrative records in order to deprive Plaintiffs of their constitutional rights. *Simmons*, 47 F.3d at 1376–77.

Plaintiffs do not even plausibly allege the *members* of the purported conspiracy. They claim that "President Trump, Defendant Ross, Defendant Dillingham, John Gore, Attorney General Sessions, Kris Kobach, and Stephen Bannon conspired to . . . produce citizenship data for use along with the P.L. 94-171 Redistricting Data File." FAC ¶ 115. But Plaintiffs own allegations make clear that then-Attorney General Sessions, then-Assistant Attorney General Gore, then-Kansas Secretary of State Kris Kobach, and then-White House adviser Stephen Bannon were only involved, if at all, with the inclusion of a citizenship question. *See, e.g.*, *id.* ¶¶ 74–75. None of these individuals are alleged to have been involved in the decision to collect citizenship information through administrative records. That makes sense because three of the four—Messrs. Sessions, Kobach, and Bannon—left their respective positions long before the President issued his

Executive Order, while Mr. Gore left his position shortly thereafter.[19] And Dr. Hofeller—the author of documents at the heart of the "conspiracy" that allegedly evinced discriminatory animus—had been deceased for almost a year when the President issued his Executive Order.[20]

Plaintiffs' allegations about the remaining "conspirators"—President Trump, Defendant Ross, and Defendant Dillingham—are perfunctory, at best. Dr. Dillingham, for example, appears only in the FAC's caption, its description of parties and venue, and its conclusory causes of action. *See id.* ¶¶ 16, 20, 115–16. But no matter. As Executive Branch officials, the President, the Secretary of Commerce, and the Director of the Census Bureau are legally incapable of a § 1985(3) conspiracy. The intracorporate-conspiracy doctrine applies to § 1985(3) claims, *Buschi v. Kirven*, 775 F.2d 1240, 1251–52 (4th Cir. 1985),

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[19] Devlin Barrett, et al., *Jeff Sessions forced out as attorney general*, Washington Post (Nov. 7, 2018), https://www.washingtonpost.com/world/national-security/attorney-general-jeff-sessions-resigns-at-trumps-request/2018/11/07/d1b7a214-e144-11e8-ab2c-b31dcd53ca6b_story.html; Associated Press, *Kobach says he's seriously considering US Senate bid in 2020* (Jan. 19, 2019), https://apnews.com/9de85ad8578243e3aa7fbbcab28e5de0; Sam Levine, *DOJ Official Who Played Big Role In Push For Citizenship Question To Leave Trump Admin*, Huffington Post (Aug. 9, 2019), https://www.huffpost.com/entry/john-gore-leaving-doj_n_5d4d8fa0e4b09e7297459561; Andrew Rafferty, et al., *Steve Bannon Out as White House Chief Strategist*, NBC News (Aug. 18, 2017), https://www.nbcnews.com/politics/politics-news/steve-bannon-out-white-house-chief-strategist-n793921.

[20] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, New York Times (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

and dictates that "there is no unlawful conspiracy when officers within a single corporate entity consult among themselves and then adopt a policy for the entity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). The rationale for this doctrine is that "[c]onspiracy requires an agreement . . . between or among two or more separate persons," but "[w]hen two agents of the same legal entity make an agreement in the course of their official duties . . . their acts are attributed to [the] principal," so "there has not been an agreement between two or more separate people." *Id.* Because the President, the Secretary of Commerce, and the Census Bureau's Director are all Executive Branch officers, they cannot conspire for purposes of § 1985(3). *See Ziglar*, 137 S. Ct. at 1867; *Buschi*, 775 F.2d at 1251–52.

At bottom, Plaintiffs' § 1985(3) claim "amounts to nothing more than rank speculation and conjecture." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 422 (4th Cir. 1996). Their allegations, to the extent there are any, are implausible, incomplete, and insufficient to satisfy their "weighty burden" of "establish[ing] a civil rights conspiracy." *Id.* at 421.

D. If Plaintiffs' § 1985(3) claim is viable, their APA claims should be dismissed.

If Plaintiffs may pursue an official-capacity § 1985(3) claim, then their claims under the APA must be dismissed because they have an adequate alternative remedy. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704; *see Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Here, Plaintiffs seek nearly the same relief under the APA and § 1985(3): an order declaring illegal "Secretary

Ross's decision to follow EO 13380" and "[e]njoin[ing] Defendants and their agents from collecting data as dictated by EO 13380." FAC at 31; *see id.* ¶¶ 88–117. If the Court allows Plaintiffs' § 1985(3) claim to proceed, and the Court has not already dismissed Plaintiffs' APA claims for the reasons explained above, then the Court should dismiss Plaintiffs' APA claims because Plaintiffs would have an "other adequate remedy in a court." 5 U.S.C. § 704.

CONCLUSION

The Court should dismiss Plaintiffs' FAC for the reasons explained above.

DATED: December 18, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DIANE KELLEHER
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
STEPHEN EHRLICH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel.: (202) 305-9803
Email: stephen.ehrlich@usdoj.gov

Counsel for Defendants

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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.*; and STATE OF NEW YORK, *et al.*, *Intervenor-Defendants.*	Case No. 2:18-cv-00772-RDP

DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT

Defendants respond to the allegations in Plaintiffs' First Amended Complaint for Declaratory Relief (ECF No. 112) in the correspondingly numbered paragraphs below.

INTRODUCTION

1. The first sentence sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required. The second sentence is a characterization of the Residence Rule, to which Defendants refer for its complete and accurate contents. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the final sentence.

2. This paragraph sets forth Plaintiffs' characterization of this action and legal

conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining factual allegations.

3. This paragraph sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining factual allegations.

4. This paragraph sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required.

5. This paragraph refers to the Residence Rule and other legal authorities, to which Defendants refer for their complete and accurate contents, and sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required.

JURISDICTION AND VENUE

6. This paragraph sets forth legal conclusions, to which no response is required.

7. This paragraph sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required.

8. This paragraph sets forth Plaintiffs' characterization of this action and legal conclusions, to which no response is required.

9. This paragraph sets forth Plaintiffs' characterization of this action, to which no response is required.

THE PARTIES

1. Defendants admit the allegations contained in the first sentence. The second sentence sets forth legal conclusions to which no response is required.[1]

[1] The numbering of the paragraphs in Plaintiffs' Amended Complaint reset at the beginning of the section entitled "THE PARTIES."

2. Defendants admit the allegations contained in the first sentence. Defendants admit that Plaintiff Brooks currently represents Alabama's 5th Congressional District, but otherwise lack knowledge or information sufficient to form a belief regarding the remaining allegations in the second sentence. Defendants lack knowledge or information sufficient to form a belief regarding the allegations in the third sentence.

3. This paragraph sets forth legal conclusions, to which no response is required.

4. Defendants admit the allegations contained in the first sentence. The second and third sentences set forth legal conclusions, to which no response is required. The fourth sentence sets forth Plaintiffs' characterization of this action, to which no response is required.

5. This paragraph sets forth legal conclusions, to which no response is required.

6. Defendants admit the allegations contained in the first sentence. The second sentence sets forth Plaintiff's characterization of this action, to which no response is required.

ALLEGATIONS

7. This paragraph contains citations to authority, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

8. This paragraph contains citations to authority, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

9. This paragraph contains citations to authority, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

10. This paragraph contains citations to authority, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

11. This paragraph sets forth legal conclusions, to which no response is required.

12. Defendants deny the allegations contained in the first sentence, except to admit

that, to attempt to enable a person-by-person count, among other things the Census Bureau sends out a questionnaire to households in the United States. The second sentence contains a citation to authority, to which Defendants refer for its complete and accurate contents. Defendants deny any remaining allegations in the second sentence. Defendants deny the allegations contained in the third sentence, except to admit that, among other things, the Census Bureau counts responses from every household as part of its effort to determine the population of the states.

13. This paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

14. This paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

15. This paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

16. This paragraph sets forth legal conclusions, to which no response is required. To the extent a response is required, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation regarding how "[t]he apportionment population of a state generally is defined."

17. The first sentence sets forth legal conclusions, to which no response is required, or purports to describe a process by which residents of a state provide information to the Census Bureau, to which Defendants deny the allegations, except to admit that the described process is one of many ways in which a resident may be counted. The second sentence contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

18. Defendants deny the allegation in the first sentence that Census Bureau

regulations govern the conduct of the 2020 Census. The remainder of this paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

19. Defendants deny the allegations contained in the first sentence, except to admit that some citizens of foreign countries are counted in the census tally used for apportionment purposes regardless of whether they are legal permanent residents of the United States. The second sentence describes the record of comments for the 2020 Residence Rule, to which Defendants refer for its complete and accurate contents.

20. Defendants deny that the Secretary of Commerce will use "estimates." The remainder of this paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

21. Defendants deny that the Secretary of Commerce will deliver "estimates." The remainder of this paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

22. This paragraph sets forth legal conclusions, to which no response is required.

23. This paragraph sets forth legal conclusions, to which no response is required.

24. Denied, except to admit that the memorandum announcing the decision to ask a question regarding citizenship status on the 2020 Census is dated March 26, 2018.

25. This paragraph characterizes the Residence Rule, to which Defendants refer for its complete and accurate contents. To the extent a response is otherwise required, Defendants deny the allegations, except to admit that neither the Department of Commerce nor the Census Bureau has announced a decision to add a question to determine whether a Census respondent and his dependents have legal permanent resident status in the United States.

26. Admitted.

27. This paragraph contains a citation to authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

28. This paragraph characterizes the Residence Rule, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

29. The first three sentences and the last sentence are vague and undefined, thus precluding a fair response by Defendants. The fourth and fifth sentences cite documents, to which Defendants refer for their complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

30. The first and third sentences are vague and undefined, thus precluding a fair response by Defendants. The remainder of this paragraph cites documents, to which Defendants refer for their complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

31. Denied, except to admit that, in previous censuses, the Census Bureau has not sought to exclude illegal aliens residing in each state in enumerating the number of persons in each state, that apportionment was based on the total resident population of each state, and that the total resident population of each state has included illegal aliens.

32. Defendants deny the allegations in the first sentence, except to admit that a set number of House seats and Electoral College votes are reapportioned amongst the states at the end of every decennial Census. Defendants admit the allegations contained in the second sentence. The third sentence cites legal authority, to which Defendants refer for its complete and accurate contents, and otherwise deny the allegations contained in the third sentence. Defendants deny the allegations contained in the fourth sentence, except to admit that census

figures are used for congressional apportionment.

33. The allegations contained in this paragraph are vague and undefined, thus precluding a fair response by Defendants. To the extent a response is required, Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

34. This paragraph cites a document, to which Defendants refers for its complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

35. This paragraph cites a document, to which Defendants refer for its complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

36. This paragraph cites documents, to which Defendants refer for their complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

37. This paragraph sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

38. This paragraph sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

39. This paragraph cites a document, to which Defendants refer for its complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

40. This paragraph cites a document, to which Defendants refer for its complete and accurate contents. Defendants deny any remaining allegations in this paragraph.

41. This paragraph is vague and undefined, thus precluding a fair response by Defendants.

42. The first two sentences cite a document, to which Defendants refer for its complete and accurate contents. Defendants lack knowledge or information sufficient to form a

belief as to the truth of the remaining allegations in this paragraph.

43. Defendants admit that the 2000 apportionment resulted in a change of 12 congressional seats and Electoral College votes, but otherwise lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

44. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

45. The first and last sentences cite a document, to which Defendants refer for its complete and accurate contents. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

46. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

47. This paragraph cites a document, to which Defendants refer for its complete and accurate contents. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

48. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

49. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

50. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

51. Denied.

52. Admitted.

53. Admitted.

54. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

55. Admitted.

56. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

57. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

58. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

59. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

60. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

61. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

62. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

63. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

64. This paragraph sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

65. Defendants lack knowledge or information sufficient to form a belief as to the

truth of the allegations in this paragraph.

66. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

67. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

68. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

69. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

70. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

71. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

72. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

73. This paragraph sets forth legal conclusions, to which no response is required.

74. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents.

75. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

76. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

77. This paragraph cites legal authority, to which Defendants refer for its complete

and accurate contents, or sets forth legal conclusions, to which no response is required.

78. This paragraph sets forth legal conclusions, to which no response is required.

79. This paragraph sets forth legal conclusions, to which no response is required.

80. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

81. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required.

82. This paragraph sets forth legal conclusions, to which no response is required.

83. This paragraph sets forth legal conclusions, to which no response is required.

84. This paragraph sets forth legal conclusions, to which no response is required.

85. This paragraph sets forth legal conclusions, to which no response is required.

86. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

87. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents.

88. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

89. This paragraph cites a document, to which Defendants refer for its complete and accurate contents. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

90. This paragraph is vague and undefined, thus precluding a fair response, or sets

forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

91. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

92. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

93. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

94. This paragraph sets forth legal conclusions, to which no response is required.

95. This paragraph sets forth legal conclusions, to which no response is required.

96. This paragraph sets forth legal conclusions, to which no response is required.

97. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

98. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

99. This paragraph sets forth legal conclusions, to which no response is required.

100. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required.

101. This paragraph is vague and undefined, thus precluding a fair response, or sets forth legal conclusions, to which no response is required.

102. This paragraph sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of any remaining allegations in this paragraph.

103. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

104. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

105. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

106. This paragraph sets forth legal conclusions, to which no response is required. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

107. This paragraph sets forth legal conclusions, to which no response is required.

108. This paragraph sets forth legal conclusions, to which no response is required.

109. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

110. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

111. This paragraph cites legal authorities, to which Defendants refer for their

complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

112. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

113. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

114. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

115. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

116. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences. The third sentence sets forth a legal conclusion, to which no response is required.

117. This paragraph refers to legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

118. This paragraph sets forth legal conclusions, to which no response is required.

119. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

120. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents.

121. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth a legal conclusion, to which no response is required.

122. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents, or sets forth legal conclusions, to which no response is required.

123. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

124. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

125. This paragraph sets forth legal conclusions, to which no response is required.

FIRST CAUSE OF ACTION

126. Defendants incorporate by reference their responses in the preceding paragraphs.

127. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents.

128. This paragraph sets forth legal conclusions, to which no response is required.

SECOND CAUSE OF ACTION

129. Defendants incorporate by reference their responses in the preceding paragraphs.

130. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents.

131. This paragraph sets forth legal conclusions, to which no response is required.

THIRD CAUSE OF ACTION

132. Defendants incorporate by reference their responses in the preceding paragraphs.

133. This paragraph cites legal authorities, to which Defendants refer for their complete and accurate contents.

134. This paragraph sets forth legal conclusions, to which no response is required.

FOURTH CAUSE OF ACTION

135. Defendants incorporate by reference their responses in the preceding paragraphs.

136. This paragraph cites legal authority, to which Defendant refers for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

137. This paragraph cites legal authority, to which Defendants refer for its complete and accurate contents, or sets forth legal conclusions, to which no response is required. Defendants deny any remaining allegations in this paragraph.

138. This paragraph sets forth legal conclusions, to which no response is required.

FIFTH CAUSE OF ACTION

139. Defendants incorporate by reference their responses in the preceding paragraphs.

140. This paragraph cites legal authority, to which Defendant refers for its complete and accurate contents, or sets forth legal conclusions, to which no response is required.

141. This paragraph sets forth legal conclusions, to which no response is required.

142. This paragraph sets forth legal conclusions, to which no response is required.

143. This paragraph sets forth legal conclusions, to which no response is required.

PRAYER FOR RELIEF

144. This paragraph sets forth Plaintiffs' Prayer for Relief, to which no response is required. To the extent a response is required, Defendants deny that Plaintiffs are entitled to any relief.

Each and every allegation in the First Amended Complaint not expressly admitted or

denied is hereby denied.

FIRST AFFIRMATIVE DEFENSE: WAIVER

Plaintiffs' Administrative Procedure Act claims are waived for failure to present them to the Commerce Department or Census Bureau during the public comment period for the proposed Residence Rule.

Having fully answered Plaintiffs' First Amended Complaint, Defendants respectfully request that the Court enter judgment dismissing this action and awarding Defendants costs and such other relief as the Court may deem appropriate.

Dated: October 1, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Branch Director

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG (DC Bar #467513)
Assistant Branch Director
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel.: (202) 514-3374
Fax: (202) 616-8460
Email: brad.rosenberg@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2019, 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 parties in this litigation.

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG (DC Bar #467513)
Assistant Branch Director
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel.: (202) 514-3374
Fax: (202) 616-8460
Email: brad.rosenberg@usdoj.gov

Counsel for Defendants

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

STATE OF ALABAMA, *et al.*, *Plaintiffs*, v. THE UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*, and DIANA MARTINEZ, *et al.*; COUNTY OF SANTA CLARA, CALIFORNIA, *et al.*; and STATE OF NEW YORK, *et al.*, *Intervenor-Defendants.*	)	Case No. 2:18-cv-00772-RDP

DEFENDANTS' OBJECTIONS AND RESPONSES
TO PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants the United States Department of Commerce, Wilbur Ross, in his official capacity as Secretary of Commerce, the United States Census Bureau, and Steven Dillingham, in his official capacity as Director of the Census Bureau (Defendants), by and through counsel, provide the following objections and responses to Plaintiffs' First Requests for Production.

OBJECTIONS TO ALL REQUESTS FOR PRODUCTION

1. Defendants object to Plaintiffs' discovery requests to the extent they seek documents that are publicly available, already produced to Plaintiffs in the administrative record, or are readily accessible to Plaintiffs or otherwise would be less burdensome for Plaintiffs to obtain than

Defendants. *See* Fed. R. Civ. P. 26(b)(2)(C). Defendants will not reproduce documents already produced in the administrative record.

2. Defendants object to Plaintiffs' requests to produce "any" and "all" documents related to an issue or topic because such requests are vague, ambiguous, overbroad, and disproportionately burdensome. Read expansively, a request to produce "any" and "all" documents could require a document-by-document review of materials generated within the United States Department of Commerce—a large federal agency with tens of thousands of employees. The burden of such a review disproportionately outweighs any possible need for the requested documents. Accordingly, Defendants will identify relevant documents based on search terms.

3. Defendants object to Plaintiffs' requests to the extent that the requests impose burdens beyond the permissible scope of discovery as outlined in Federal Rule of Civil Procedure 26, i.e., nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

4. Defendants object to Plaintiffs' requests to the extent that they seek (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) information protected by the deliberative process privilege, the joint defense privilege, common interest privilege, or law enforcement privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; (e) information protected by any form of executive privilege; or (f) any other applicable privilege or protection.

5. Defendants specifically decline to produce privileged information. A privilege log will be provided for materials gathered pursuant to the search terms specified in Defendants' responses to

these requests at the conclusion of Defendants' rolling productions. Defendants will not produce a privilege log for materials that were provided as part of the administrative record, materials are publicly available, and materials that were otherwise previously produced. Defendants further object to any requirement that it produce a privilege log for privileged material not otherwise properly within the scope of discovery and/or as to which no privilege log would be required pursuant to Federal Rule of Civil Procedure 26(b)(5).

6. Each and every response contained herein is subject to the above objections, which apply to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

7. Defendants specifically reserve the right to make further objections as necessary to the extent additional issues arise regarding the meaning of and/or information sought by discovery.

OBJECTIONS TO SPECIFIC REQUESTS FOR PRODUCTION

Request for Production No. 1. All memoranda, reports, and executive summaries of reports regarding the citizenship question.

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the terms "reports" and "memoranda" are vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials that have been made publicly available concerning the decision to attempt to reinstate a citizenship question on the 2020 Census. *See* Electronic FOIA Library, Dep't of Commerce, www.osec.doc.gov/opog/FOIA/FOIA_elibrary.html (last visited November 7, 2019) (Electronic FOIA Library). Defendants will separately provide Plaintiffs access to the materials that have been

produced as part of the litigation concerning the attempted reinstatement of the citizenship question on the 2020 Census.

Request for Production No. 2. All memoranda, reports, and executive summaries of reports regarding implementation of Executive Order 13,880.

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants further object to this request because the terms "reports" and "memoranda" are vague and ambiguous. Defendants also object to this request because the phrase "regarding implementation" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants will identify custodians within the Office of the Director and Deputy Director (DIR/DEPDIR), the Communications Directorate (ADCOM), the Decennial Census Programs Directorate (ADDC), the Demographic Programs Directorate (ADDP), Economic Programs Directorate (ADEP), and Research and Methodology Directorate (ADRM), who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged memoranda, reports, and executive summaries of reports responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 3. All documents concerning the information that the Census Bureau currently has access to that can be used to determine citizenship.

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrase "can be used to determine citizenship" is vague and ambiguous.

Defendants also object to this request on the ground that it misstates the role of the Census Bureau. The Census Bureau does not "determine citizenship;" rather, it collects data about the population. Ascertaining what documents could be used to "determine citizenship" therefore requires speculation, and creates a burden that disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request to the extent it calls for the production of private or confidential personal information that is statutorily protected from disclosure.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census.

Defendants will further identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM, who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged memoranda, reports, and executive summaries of reports responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 4. All documents concerning or reflecting the information that the Census Bureau needs, or believes that it needs, to determine the citizenship of contacted individuals.

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrases "needs" and "believes that it needs" are vague and ambiguous.

Defendants also object to this request on the ground that it misstates the role of the Census Bureau. The Census Bureau does not "determine citizenship;" rather, it collects data about the population. Ascertaining what documents could be used to "determine citizenship" therefore requires speculation, and creates a burden that disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request to the extent it calls for the production of private or confidential personal information that is statutorily protected from disclosure.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census.

Defendants will further identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM, who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien

- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged memoranda, reports, and executive summaries of reports responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 5. All documents concerning the information that the Census Bureau currently has access to that can be used to determine the immigration status of noncitizens.

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrases "has access" and "can be used to determine the immigration status" are vague and ambiguous.

Defendants also object to this request on the ground that it misstates the role of the Census Bureau. The Census Bureau does not "determine [individuals'] immigration status;" rather, it collects data about the population. Ascertaining what documents could be used to "determine the immigration status" of individuals therefore requires speculation, and creates a burden that disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request to the extent it calls for the production of private or confidential personal information that is statutorily protected from disclosure.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census.

Defendants will further identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM, who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)

- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged memoranda, reports, and executive summaries of reports responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 6. All documents concerning the information that the Census Bureau needs, or believes that it needs, to determine the immigrations status of noncitizens.

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrases "needs" and "believes that it needs" are vague and ambiguous.

Defendants also object to this request on the ground that it misstates the role of the Census Bureau. The Census Bureau does not "determine [individuals'] immigration status;" rather, it collects data about the population. Ascertaining what documents could be used to "determine the immigration status" of individuals therefore requires speculation, and creates a burden that disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request to the extent it calls for the production of private or confidential personal information that is statutorily protected from disclosure.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census.

Defendants will further identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM, who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged documents responsive to this requestin Defendants' possession, custody, or control.

Request for Production No. 7. All documents used to produce the document: J. DAVID BROWN, ET. AL, CENSUS BUREAU, UNDERSTANDING THE QUALITY OF ALTERNATIVE CITIZENSHIP DATA SOURCES FOR THE 2020 CENSUS (Aug. 2018).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrase "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census. Defendants will further produce the materials cited in the bibliography of the identified document.

Request for Production No. 8. All documents used to produce the document: MICHAEL BERNING, ET. AL, CENSUS BUREAU, ALTERNATIVE SOURCES OF CITIZENSHIP DATA FOR THE 2020 CENSUS (2017).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrase "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a

citizenship question on the 2020 Census. Defendants will further produce the materials cited in the bibliography of the identified document.

Request for Production No. 9. All documents used to produce the document: JOHN M. ABOWD & VICTORIA VELKOFF, CENSUS BUREAU, UPDATE ON DISCLOSURE AVOIDANCE AND ADMINISTRATIVE DATA (Sept. 13, 2019).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request because the phrase "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants will produce the materials cited in the bibliography of the identified document.

Request for Production No. 10. All documents used to produce the document: Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., U.S. Se'y of Commerce (Jan. 19, 2018).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request on the ground that the term "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials that have been made publicly available concerning the decision to attempt to reinstate a citizenship question on the 2020 Census. *See* Electronic FOIA Library. Defendants will separately provide Plaintiffs access to the materials that have been produced as part of the litigation concerning the attempted reinstatement of the citizenship question on the 2020 Census.

Request for Production No. 11. All documents used to produce the document: Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., U.S. Se'y of Commerce (March 1, 2018).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request on the ground that the term "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials that have been made publicly available concerning the decision to attempt to reinstate a citizenship question on the 2020 Census. *See* Electronic FOIA Library. Defendants will separately provide Plaintiffs access to the materials that have been produced as part of the litigation concerning the attempted reinstatement of the citizenship question on the 2020 Census.

Request for Production No. 12. All documents used to produce the document: Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Ron. S. Jarmin, Performing the Non-exclusive Functions and Duties of the Director, U.S. Census Bureau (Jan. 3, 2018).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request on the ground that the term "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials that have been made publicly available concerning the decision to attempt to reinstate a citizenship question on the 2020 Census. *See* Electronic FOIA Library. Defendants will separately provide Plaintiffs access to the materials that have been produced as part of the litigation concerning the attempted reinstatement of the citizenship question on the 2020 Census.

Request for Production No. 13. All documents used to produce the document: Memorandum from Wilbur L. Ross, Jr., U.S. Sec'y of Commerce, to Karen Dunn Kelly, Under Sec'y for Econ. Affairs, U.S. Dep't of Commerce (March 26, 2018).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request on the ground that the term "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials that have been made publicly available concerning the decision to attempt to reinstate a citizenship question on the 2020 Census. *See* Electronic FOIA Library. Defendants will separately provide Plaintiffs access to the materials that have been produced as part of the litigation concerning the attempted reinstatement of the citizenship question on the 2020 Census.

Request for Production No. 14. All documents used to produce the document: *Congressional Apportionment: Frequently Asked Questions*, U.S. Census Bureau, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html (last updated Aug. 26, 2015).

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request because it is vague as to time. Defendants further object to this request on the ground that the term "used to produce" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants will identify custodians who were involved in producing the referenced website and search their files from January 20, 2017 using the following search terms:

- Website AND (apportion* AND FAQ OR posting)

Defendants will produce nonprivileged documents responsive to this requestin Defendants' possession, custody, or control.

Request for Production No. 15. All documents concerning plans or efforts to implement Executive Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants also object to this request because the terms "plans" and "efforts" are vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants will identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged documents responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 16. All documents concerning the formation of the working group called for in Executive Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019)

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants also object to this request because the term "formation" is vague and ambiguous.

RESPONSE: Subject to and without waiving the above objections, Defendants will identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien
- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged documents responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 17. All documents concerning communications with other agencies regarding the acquisition of information that is the subject of Executive Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019).

OBJECTIONS: Defendants incorporate by reference the above objections. Defendants also object to this request because the terms "communications" and "acquisition" are vague and ambiguous. Defendants further object because requiring a search for documents "concerning" communications with other agencies creates a burden that disproportionately outweighs any possible need for the requested documents.

RESPONSE: Subject to and without waiving the above objections, Defendants will identify custodians within DIR/DEPDIR, ADCOM, ADDC, ADDP, ADEP, and ADRM who may have potentially relevant materials, and search email and non-email digital files for those custodians created after July 10, 2019 using the following search terms:

- Exec* w/5 Order
- (13880 OR 13,880) w/5 (Order OR Group)
- Citizenship OR citizen OR immigra* OR alien

- (President OR White House OR WH OR EO) AND (Working Group OR IWG or WG) AND (administrative w/5 records)

Defendants will produce nonprivileged communications responsive to this request in Defendants' possession, custody, or control.

Request for Production No. 18. All documents concerning any other prior studies or analyses regarding the determination of an individual's citizenship status or lawful presence for any Census purpose.

OBJECTION: Defendants incorporate by reference the above objections. Defendants also object to this request on the ground that it is overbroad and not proportional to the needs of the case because it is unlimited as to time. As written, the request could apply to any prior census. Given that censuses date back to the ratification of the Constitution, this request sweeps in decades- or centuries-old documents from long before the events at issue in this case without regard to their relevancy to Plaintiffs' claims, which concern the enumeration methodology for the upcoming 2020 Census. The burden of obtaining and producing all such documents disproportionately outweighs any possible need for the requested documents.

RESPONSE: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the materials made available in connection with the litigation over the attempted reinstatement of a citizenship question on the 2020 Census.

Dated: November 8, 2019

JOSEPH H. HUNT
Assistant Attorney General

ALEX K. HAAS
Director, Federal Programs Branch

DIANE KELLEHER
BRAD P. ROSENBERG
Assistant Branch Directors

/s/ Alexander V. Sverdlov
ALEXANDER V. SVERDLOV (NY Bar 4918793)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 305-8550
alexander.v.sverdlov@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I served the foregoing via email to designated counsel of record as agreed to by the parties:

For Plaintiff State of Alabama:

Jim Davis	JimDavis@ago.state.al.us
Brad Chynoweth	bchynoweth@ago.state.al.us
Edmund LaCour	Edmund.LaCour@alabamaag.gov
Win Sinclair	wsinclair@ago.state.al.us
Brenton Smith	bsmith@ago.state.al.us

For Plaintiff Mo Brooks:
Marshall.Yates@mail.house.gov

For Local Government Intervenors:

Anil Mujumdar	anil@zarzaur.com
Ezra Rosenberg	erosenberg@lawyerscommittee.org
Dorian Spence	dspence@lawyerscommittee.org
Robin Thurston	rthurston@democracyforward.org
John Lewis	jlewis@democracyforward.org
Ryan Kusmin	rmkusmin@debevoise.com
Jonathan Weissglass	jonathan@weissglass.com
Marcelo Quinones	marcelo.quinones@cco.sccgov.org
Ravi Rajendra	raphael.rajendra@cco.sccgov.org
Robert Segall	segall@copelandfranco.com

For Martinez Intervenors:

Thomas Saenz	tsaenz@maldef.org
Denise Hulett	dhulett@maldef.org
Andrea Senteno	asenteno@maldef.org
Julia Gomez	jgomez@maldef.org
Edward Still	still@votelaw.com
James Blacksher	jblacksher@ns.sympatico.ca

For State and Other Governmental Entities Intervenors:

Matthew Colangelo	Matthew.Colangelo@ag.ny.gov
Elena Goldstein	Elena.Goldstein@ag.ny.gov
Liz Morgan	Elizabeth.Morgan@ag.ny.gov
Barry Ragsdale	bragsdale@sirote.com
Joyce Vance	joycevance4@gmail.com

/s/ Alexander V. Sverdlov
Alexander V. Sverdlov

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

STATE OF ALABAMA, *et al.*, *Plaintiffs*, v. THE UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*, and DIANA MARTINEZ, *et al.*; COUNTY OF SANTA CLARA, CALIFORNIA, *et al.*; and STATE OF NEW YORK, *et al.*, *Intervenor-Defendants.*	)	Case No. 2:18-cv-00772-RDP

DEFENDANTS' OBJECTIONS AND RESPONSES
TO PLAINTIFFS' FIRST REQUESTS FOR ADMISSION

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of this Court, Defendants the United States Department of Commerce, Wilbur Ross, in his official capacity as Secretary of Commerce, the United States Census Bureau, and Steven Dillingham, in his official capacity as Director of the Census Bureau (Defendants), by and through counsel, provide the following objections and responses to Plaintiffs' First Requests for Admission (Requests).

OBJECTIONS WHICH APPLY TO ALL REQUESTS FOR ADMISSION

1. Defendants object to the Requests to the extent that the Requests seek information that is protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, or any other recognized privilege.

2. Defendants object to the Requests to the extent that the Requests seek information beyond the possession, custody and control of Defendants. Defendants also object to the Requests to the extent the Requests seek information that cannot be obtained by Defendants after reasonably diligent inquiry, are readily available from public sources, or are available to the propounding party from another source or by other means that are more convenient, more appropriate, less burdensome, or less expensive.

3. Defendants object to any Request that is vague or calls for speculation.

4. Defendants object to the inclusion of definitions for any term not relied on in these Requests for Admission. Any requirement that Defendants respond to such definitions in the abstract is not proportional to the needs of the case and the burden of such a response outweighs its likely benefit, which is none. Defendants do not hereby waive any future objection to the definition of such terms or waive the right to use Defendants' own definition of such terms.

5. Each and every response contained herein is subject to the above objections, which apply to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

OBJECTIONS AND RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION

1. Admit that the primary mandate of the U.S. Census Bureau is apportionment of the House of Representatives.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "primary mandate" is vague and ambiguous.

RESPONSE: Denied. The United States Census Bureau (Census Bureau) has a broad mission "to serve as the leading source of quality data about the Nation's people and economy." U.S. Department of Commerce, Budget in Brief FY 2020, https://www.commerce.gov/sites/default/files/2019-

03/FY_2020_DOC_BiB-032019.pdf at 27. Among its many programs, the Census Bureau conducts the decennial census.

2. Admit that, for the 2010 Census, the Census Bureau planned to count every person who should be counted for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "every person who should be counted" is unclear even as defined by Plaintiffs, and ambiguous and vague as to time.

RESPONSE: Denied to the extent "who should be counted for apportionment purposes" can be construed expansively and without reference to any specific definition or legal criteria. Admitted only insofar as the Census Bureau intended to conduct the 2010 Census in accordance with all applicable legal requirements in place at the time.

3. Admit that, for the 2010 Census, the Census Bureau planned to count every person who should be counted for apportionment purposes in the place of his or her usual residence, except for those members of the U.S. overseas population who were counted for apportionment purposes in 2010.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "except for those members of the U.S. overseas population who were counted for apportionment purposes in 2010" is undefined, vague, and confusing. Defendants further object because the phrase "every person who should be counted" is unclear even as defined by Plaintiffs, and ambiguous and vague as to time.

RESPONSE: Denied to the extent "who should be counted for apportionment purposes" can be construed expansively and without reference to any specific definition or legal criteria. Admitted only insofar as the Census Bureau intended to conduct the 2010 Census in accordance with all applicable legal requirements in place at the time.

4. Admit that, for the 2010 Census, the apportionment population included U.S. Armed Forces personnel and federal civilian employees stationed outside the United States (and their dependents living with them) that could be allocated, based on administrative records, back to a home state.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

5. Admit that, despite the best efforts of the Census Bureau, the 2010 Census did not count all persons who should have been counted for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "every person who should be counted" is unclear even as defined by Plaintiffs, and ambiguous and vague as to time.

RESPONSE: Denied to the extent "who should be counted for apportionment purposes" can be construed expansively and without reference to any specific definition or legal criteria. Admitted only insofar as the Census Bureau's subsequent analyses of the 2010 Census estimated a small, statistically insignificant net overcount, and small undercounts for certain populations.

6. Admit that the apportionment population reported as a result of the 2010 Census included illegal aliens.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

7. Admit that the apportionment population reported as a result of the 2010 Census included noncitizens in custody who were subject to final deportation orders, final removal orders, or final exclusion orders.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

8. Admit that, for the 2020 Census, the Census Bureau is committed to counting every person who should be counted for apportionment purposes in the place of his or her usual residence, except for those members of the U.S. overseas population who will be counted for apportionment purposes in 2020.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "every person who should be counted" is unclear even as defined by Plaintiffs, and ambiguous and vague as to time.

RESPONSE: Denied to the extent "who should be counted for apportionment purposes" can be construed expansively and without reference to any specific definition or legal criteria. Admitted only insofar as the Census Bureau is committed to conducting the 2020 Census in accordance with all applicable legal requirements in place at the time.

9. Admit that, despite the anticipated best efforts of the Census Bureau, the 2020 Census will not be able to count all persons who should be counted for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the phrase "all persons who should be counted" is unclear even as defined by Plaintiffs (or is otherwise undefined), and because it is ambiguous and vague as to time. Defendants further object because this request calls for speculation about an event that has not taken place.

RESPONSE: Denied to the extent "who should be counted for apportionment purposes" can be construed expansively and without reference to any specific definition or legal criteria. Moreover, denied because the 2020 Census has not yet taken place. The Census Bureau is committed to conducting the 2020 Census in accordance with all applicable legal requirements in place at the time.

10. Admit that, under the Census Bureau's current criteria, the apportionment population reported as a result of the 2020 Census will include illegal aliens.

OBJECTION: Defendants incorporate by reference the above general objections. Defendant further objects because this request calls for speculation about an event that has not taken place.

RESPONSE: Admitted.

11. Admit that, under the Census Bureau's current criteria, the apportionment population reported as a result of the 2020 Census will include noncitizens in custody who are subject to final deportation orders, final removal orders, or final exclusion orders.

OBJECTION: Defendants incorporate by reference the above general objections. Defendant further objects because this request calls for speculation about an event that has not taken place.

RESPONSE: Admitted.

12. Admit that, for the 2010 Census, the Census Bureau used administrative records to determine the Federally Affiliated Count Overseas.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

13. Admit that, for the 2010 Census, the Census Bureau used administrative records to determine the home state of individuals included in the Federally Affiliated Count Overseas.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Denied. For the 2010 Census, the Census Bureau did not determine the home state of individuals included in the Federally Affiliated Count Overseas; rather, federal departments and agencies, through administrative records, provided certified counts by home state for their federally affiliated employees living overseas to the Census Bureau pursuant to the Census Bureau's request. *See* 2010 U.S. Census Bureau, Census Federally Affiliated Overseas Count Operation Assessment Report, (March 19, 2012) https://www2.census.gov/programs-surveys/decennial/2010/program-management/5-review/cpex/2010-memo-181.pdf at viii.

14. Admit that, for the 2010 Census, individuals included in the Federally Affiliated Count Overseas were allocated to the populations of their home states for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

15. Admit that, for the 2010 Census, individuals included in the Federally Affiliated Count Overseas were allocated to the populations of their home states **only** for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

16. Admit that, for the 2010 Census, individuals included in the Federally Affiliated Count Overseas were not distributed to political subdivisions of the states.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

17. Admit that, for the 2010 Census, the Federally Affiliated Count Overseas was not used for redistricting because the home state data for the overseas population do not meet the substate geographical precision required to conduct redistricting (i.e., census blocks).

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Because the Census Bureau does not conduct redistricting, Defendants lack knowledge or information as to how particular states use the Federally Affiliated Count Overseas, and on that basis deny the request, except to admit only that the Federally Affiliciated Count Overseas does not contain substate geographical precision.

18. Admit that, for the 2020 Census, the Census Bureau will use administrative records to determine the Federally Affiliated Count Overseas.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

19. Admit that, for the 2020 Census, the Census Bureau will use administrative records to determine the home state of individuals included in the Federally Affiliated Count Overseas.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Denied. The Census Bureau does not intend to determine the home state of individuals as part of the Federally Affiliated Count Overseas; rather, as with the 2010 Census, the Census Bureau intends to request that federal agencies provide certified counts by home state, through administrative records, for their federally affiliated employees living overseas to the Census Bureau, pursuant to the Census Bureau's request.

20. Admit that, for the 2020 Census, individuals included in the Federally Affiliated Count Overseas will be allocated to the populations of their home states for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

21. Admit that, for the 2020 Census, individuals included in the Federally Affiliated Count Overseas will be allocated to the populations of their home states **only** for apportionment purposes.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

22. Admit that, for the 2020 Census, individuals included in the Federally Affiliated Count Overseas will not be distributed to political subdivisions of the states.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object because the term "distributed" is vague and ambiguous.

RESPONSE: Admitted that for the 2020 Census, individuals included in the Federally Affiliated Count Overseas will not be allocated to political subdivisions of the states. Otherwise, denied.

23. Admit that, for the 2020 Census, the Federally Affiliated Count Overseas will not be used for redistricting because the home state data for the overseas population do not meet the substate geographical precision required to conduct redistricting (i.e., census blocks).

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Because the Census Bureau does not conduct redistricting, Defendants lack knowledge or information as to how particular states may use the Federally Affiliated Count Overseas, and on that basis deny the request, except to admit only that the Federally Affiliciated Count Overseas will not contain substate geographical precision.

24. Admit that "[i]t is the policy of the United States to develop complete and accurate data on the number of citizens, non-citizens, and illegal aliens in the country." See Exec. Order No. 13,880, 84 Fed. Reg. 33,821, 33,824 (July 11, 2019).

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted only insofar as the request accurately quotes Executive Order No. 13,880.

25. Admit that Executive Order 13,880 was published in the Federal Register and is available at: https://www.federalregister.gov/documents/2019/07/16/2019-15222/collecting-information-about-citizenship-status-in-connectionwith-the-decennial-census.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

26. Admit that the President of the United States, by Executive Order 13,880 ordered all agencies to promptly provide the Department of Commerce the maximum assistance permissible, consistent with law, in determining the number of citizens, noncitizens, and illegal aliens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted only insofar as the portion of this request from "the maximum assistance permissible" through "objective" accurately quotes Executive Order 13,880.

27. Admit that, consistent with Executive Order 13,880, the Director of the Census Bureau established an interagency working group to coordinate efforts, consistent with law, to maximize the availability of administrative records in connection with the census, with the goal of obtaining administrative records that can help establish citizenship status for 100 percent of the population.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

28. Admit that the Department of Commerce has access to existing governmental records for the purpose of developing complete and accurate data on the number of citizens, noncitizens, and illegal aliens in the country.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames. Defendants further object that the word "access" is undefined and vague.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

29. Admit that the Census Bureau, using existing governmental records to which it has access, can accurately determine the citizenship status of contacted individuals and their household members.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames, and because the term "contacted individuals" is vague and ambiguous.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

30. Admit that the Census Bureau, using existing governmental records to which it has access, can accurately determine whether contacted individuals and their household members are part of the legally resident immigrant population.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames, and because the term "contacted individuals" is vague and ambiguous.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

31. Admit that the Census Bureau, using existing governmental records to which it has access, can accurately determine whether contacted individuals and their household members are illegal aliens.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as

defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames, and because the term "contacted individuals" is vague and ambiguous.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

32. Admit that the Census Bureau, using existing governmental records to which it has access, can accurately determine the legally resident immigrant population of each state.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

33. Admit that the Census Bureau, using existing governmental records to which it has access, can accurately determine the number of illegal aliens in each state.

OBJECTION: Defendants incorporate by reference the above general objections. Defendants further object to the term "existing government records" as overly broad, unclear, and vague, even as defined by Plaintiffs. Defendants further object because the request fails to identify the relevant time frames.

RESPONSE: Admitted only insofar as the Census Bureau is acquiring administrative records in accordance with Executive Order 13,880. At this time, Defendants lack knowledge or information

sufficient to ascertain the coverage and utility of administrative records collected pursuant to the Executive Order and, on that basis, deny the remainder of this request.

34. Admit that "the administrative records citizenship data would most likely have both more accurate citizen status and fewer missing individuals than would be the case for any survey-based collection method. Finally, having two sources of administrative citizenship data permits a detailed verification of the accuracy of those sources as well." See Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., U.S. Sec'y of Commerce (March 1, 2018).

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted only insofar as the request accurately quotes the memorandum from John Abowd to Wilbur Ross, dated March 1, 2018.

35. Admit that, regarding the estimated cost of administrative data production to determine citizenship status, "the realistic range of cost estimates, including the cost of USCIS data, is between $500,000 and $2.0M." *See* Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., U.S. Sec'y of Commerce (March 1, 2018).

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted only insofar as the request accurately quotes the Memorandum from John M. Abowd to Wilbur L. Ross dated March 1, 2018.

36. Admit that the estimated cost of conducting the 2020 Census exceeds $15 billion.

OBJECTION: Defendants incorporate by reference the above general objections.

RESPONSE: Admitted.

Dated: November 8, 2019

JOSEPH H. HUNT
Assistant Attorney General

ALEX K. HAAS
Director, Federal Programs Branch

DIANE KELLEHER
BRAD P. ROSENBERG
Assistant Branch Directors

/s/ Alexander V. Sverdlov
ALEXANDER V. SVERDLOV (NY Bar 4918793)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 305-8550
alexander.v.sverdlov@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, I served the foregoing via email to designated counsel of record as agreed to by the parties:

For Plaintiff State of Alabama:

Jim Davis	JimDavis@ago.state.al.us
Brad Chynoweth	bchynoweth@ago.state.al.us
Edmund LaCour	Edmund.LaCour@alabamaag.gov
Win Sinclair	wsinclair@ago.state.al.us
Brenton Smith	bsmith@ago.state.al.us

For Plaintiff Mo Brooks:
Marshall.Yates@mail.house.gov

For Local Government Intervenors:

Anil Mujumdar	anil@zarzaur.com
Ezra Rosenberg	erosenberg@lawyerscommittee.org
Dorian Spence	dspence@lawyerscommittee.org
Robin Thurston	rthurston@democracyforward.org
John Lewis	jlewis@democracyforward.org
Ryan Kusmin	rmkusmin@debevoise.com
Jonathan Weissglass	jonathan@weissglass.com
Marcelo Quinones	marcelo.quinones@cco.sccgov.org
Ravi Rajendra	raphael.rajendra@cco.sccgov.org
Robert Segall	segall@copelandfranco.com

For Martinez Intervenors:

Thomas Saenz	tsaenz@maldef.org
Denise Hulett	dhulett@maldef.org
Andrea Senteno	asenteno@maldef.org
Julia Gomez	jgomez@maldef.org
Edward Still	still@votelaw.com
James Blacksher	jblacksher@ns.sympatico.ca

For State and Other Governmental Entities Intervenors:

Matthew Colangelo	Matthew.Colangelo@ag.ny.gov
Elena Goldstein	Elena.Goldstein@ag.ny.gov
Liz Morgan	Elizabeth.Morgan@ag.ny.gov
Barry Ragsdale	bragsdale@sirote.com
Joyce Vance	joycevance4@gmail.com

/s/ Alexander V. Sverdlov
Alexander V. Sverdlov