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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 and MORRIS J. BROOKS, JR., Representative for Alabama's 5th Congressional District, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, in his official capacity as Secretary of Commerce; BUREAU OF THE CENSUS; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau, *Defendants*, and DIANA MARTINEZ; RAISA SEQUEIRA; SAULO CORONA; IRVING MEDINA; JOEY CARDENAS; FLORINDA P. CHAVEZ; and CHICANOS POR LA CAUSA; COUNTY OF SANTA CLARA, CALIFORNIA; KING COUNTY, WASHINGTON; and CITY OF SAN JOSE, CALIFORNIA, *Intervenor-Defendants.*	Case No. 2:18-cv-00772-RDP

DEFENDANTS' REPLY SUBMISSION IN RESPONSE TO EXHIBIT B OF THE COURT'S ORDER
(REPLY IN SUPPORT OF MOTION TO DISMISS)

Plaintiffs the State of Alabama and Representative Mo Brooks have brought this lawsuit challenging the Census Bureau's practice of including illegal aliens in its forthcoming census count, alleging that the inclusion of those aliens both will cause Alabama to lose a congressional representative and Electoral College vote and will, relatively speaking, result in a loss of federal and other funding vis-à-vis other states that purportedly have a larger number of resident illegal aliens. This Court, however, lacks jurisdiction over Plaintiffs' claims for two reasons. First, Plaintiffs have failed to adequately allege an actual or imminent representational or Electoral College injury because their allegation that Alabama will lose a representative or Electoral College vote if illegal aliens are included in the census is entirely speculative. The Supreme Court cases upon which Plaintiffs rely concern different factual scenarios than those presented here, and two of those cases involved a *post-count* challenge to the Census Bureau's practices to boot. None shed light on whether Plaintiffs here have adequately alleged a future injury in a manner sufficient to survive a motion to dismiss for lack of jurisdiction. Second, Plaintiffs have not adequately alleged a financial injury arising through the inclusion of illegal aliens in the census count; if anything, that alleged injury is even more tenuous than Plaintiffs' claim of a loss of a representative and Electoral College vote. For these reasons, this Court should dismiss Plaintiffs' lawsuit for lack of jurisdiction.[1]

I. Plaintiffs' Congressional Representation and Electoral College Injuries Are Too Speculative to Confer Standing

Plaintiffs have failed to allege an actual or imminent injury. Plaintiffs say otherwise, claiming that because this case involves a "future injury," they merely need to allege that "there is

[1] This Court has requested supplemental briefing on Alabama's alleged financial injury and redressability. *See* Order, ECF No. 55. Defendants addressed Alabama's alleged financial injury in their opening memorandum and do so again here. Regarding redressability, Defendants take no position at this time.

a 'substantial risk' that the harm will occur." Pls.' Opp'n at 9-10, ECF No. 65 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). In support of this position, Plaintiffs cite a series of census-related cases that arose under fundamentally different factual scenarios. None support Plaintiffs' claim of standing here.

For example, Plaintiffs rely upon *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), to argue that a party can challenge Census Bureau practices if those practices are likely to result in a loss of a representative. *See* Pls.' Opp'n at 8-9. That case, however, involved a challenge to specific, statistical sampling plans that had been identified by the Census Bureau to "supplement data obtained through traditional census methods." *See Dep't of Commerce*, 525 U.S. at 324; *see* Pls.' Opp'n at 9. That, alone, distinguishes *Department of Commerce* from the situation here, which does not involve "sampling." Moreover, included in the record that the Supreme Court reviewed in that case was an affidavit demonstrating that a state was "virtually certain to lose a seat." *Dep't of Commerce*, 525 U.S. at 331.[2] The fact that the Supreme Court has previously relied upon factual submissions regarding injury in a census case claiming a loss of a representative does not automatically confer standing on any plaintiff that

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[2] That Supreme Court decision involved the review of two district cases. In the first, a group of citizens and a county in Georgia based their claim of standing on alleged vote dilution and loss of federal funding. In granting a motion for summary judgment to plaintiffs and denying a motion to dismiss filed by defendants, the district court found that it had jurisdiction because plaintiffs were "able to calculate [the proposed sampling's] effects by reference to the results of [a previously-completed Census Bureau survey], which closely mirrors the methodology the Department will utilize." *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548 (E.D. Va. 1998).

The other case was brought by the House of Representatives itself and, as such, did not involve claims of vote dilution or loss of funding as alleged by the Plaintiffs here. Instead, the alleged injuries were informational in nature. Thus, the district court concluded "that the House need not demonstrate that the use of statistical sampling will either alter state population totals or the resultant apportionment of representatives among the states." *U.S. House of Representatives v. Dep't of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998).

alleges, in a conclusory and speculative fashion, that a similar injury is likely to exist here. That is especially so because Plaintiffs' claims in this lawsuit—challenging the inclusion of illegal aliens in a census that has not yet taken place—are fundamentally different than the challenge to specific, concrete sampling methodologies at issue in *Department of Commerce.* Instead, in order to survive a motion to dismiss, a plaintiff must offer more than "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts." *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Yet that is all the State of Alabama and Representative Brooks have done: They rely on vague allegations of future "injury" based on the distribution of the illegal alien population, *see* Compl. ¶¶ 33-36, or estimates about that population that are now many years old, *see id.* ¶¶ 30, 39-40.

The other Supreme Court census cases discussed by Plaintiffs offer no help because they all took place after the census count was completed. Plaintiffs cite *Utah v. Evans*, 536 U.S. 457 (2002), but Utah brought its challenge to a Census Bureau sampling method known as "hot-deck imputation" that was used in the 2000 census only "[a]fter analyzing the census figures." *Id.* at 459. And the same is true in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), in which plaintiffs challenged the allocation of the Department of Defense's overseas employees to particular states. Thus, in both cases the impact of the Census Bureau's practice on apportionment could be ascertained with specificity, as it had already taken place. *See Utah*, 536 U.S. at 458 (imputation raised North Carolina's population by 0.4% while increasing Utah's population by 0.2%, thus resulting in North Carolina receiving one more representative and Utah receiving less representative); *Franklin*, 505 U.S. at 790-91 ("appellants' allocation of 922,819 overseas military personnel to the State designated in their personnel files as their "home of record" altered the relative state populations enough to shift a Representative from Massachusetts to Washington").

Neither of these cases, in which the impact of the challenged practice could be ascertained with precision after-the-fact, therefore has any bearing on whether Plaintiff can allege a *future* injury here, before the Census Bureau has even conducted its count, much less whether Plaintiffs here have met the pleading standard for alleging such an injury.

Plaintiffs criticize Defendants' reliance on *Ridge v. Verity*, 715 F. Supp. 1308, 1310 (W.D. Pa. 1989), *Federation for American Immigration Reform v. Klutnick*, 486 F. Supp. 564, 571 (D.D.C. 1980), and *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971), because these cases were decided at the summary judgment stage. What Plaintiffs ignore, however, are the holdings of the cases, all of which demonstrate the virtual impossibility of showing that the specific type of injury that Plaintiffs allege will occur here. *See Ridge*, 715 F. Supp. at 1318 (it would be "sheer speculation as to the identities of the states that will be affected by the inclusion of illegal aliens in the census count for purposes of apportionment"); *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 570 ("none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" when plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" depending on "the interplay of all the other population factors which affect apportionment"); *Sharrow*, 447 F.2d at 97 (standing claim "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York but for every other State as well"). Plaintiffs' opposition brief fails to meaningfully address, much less come to grips with, the substantive analysis in each of these cases.[3]

[3] As noted in Defendants' opening memorandum, these arguments are equally applicable to Representative Brooks's claims. *See* Defs.' Mem. at 9, ECF No. 45-1.

Finally, Plaintiffs cite the standards for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the well-pleaded-complaint rule to argue that this Court should deny Defendants' motion. *See* Pls.' Opp'n at 10-11. Defendants are moving to dismiss for lack of subject matter jurisdiction, however, which is analyzed under the requirements of Rule 12(b)(1). And as noted by Defendants in their opening brief, rigorous application of Rule 12(b)(1)'s requirements is necessary where, as here, a party is seeking to have the court invalidate the actions of a co-equal branch of government on constitutional grounds. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-73 (1982). At minimum, that standard requires more than the vague allegations of injury offered here. *See Oxford Asset Mgmt.*, 297 F.3d at 1188. Because that is all that Plaintiffs offer, this case should be dismissed.

II. Alabama's Alleged Financial Injury, Which Is Outside the Census Clause's Zone of Interests, is Too Speculative to Confer Standing

Both Plaintiffs and the Local Government Intervenor-Defendants contend that the State of Alabama also has standing arising from an alleged future loss of funding. In some respects, this alleged injury is even more tenuous than Plaintiffs' alleged representation injury: Not only does Alabama need to allege that the inclusion of illegal aliens will result in a lower population total vis-à-vis other states, but it also must identify specific federal funding programs pursuant to which Alabama will receive payment based on those population figures.

Plaintiffs barely try to meet their burden. As noted by Defendants in their motion to dismiss, Plaintiffs' allegations regarding financial injury are vague and conclusory. *See, e.g.*, Compl. ¶ 81. Plaintiffs do not account for the different funding mechanisms used by various federal agencies; instead, they merely cite a handful of statutory and regulatory provisions and identify past grants to claim that the inclusion of illegal aliens in the census will harm Alabama in

the future. These allegations fall far short of what is required to survive a motion to dismiss for lack of jurisdiction in this circuit. *See Oxford Asset Mgmt.*, 297 F.3d at 1188.[4]

Moreover, Plaintiffs fail to fully address Defendants' argument that any alleged financial injury falls outside the Census Clause's zone of interests. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his [C]omplaint.") (citation omitted). Plaintiffs cite *Susan B. Anthony List* to imply that the zone-of-interests requirement is no longer applicable, *see* Pls.' Opp'n at 15, but that case involved the prudential ripeness doctrine, not the zone-of-interests test. *Susan B. Anthony List*, 573 U.S. at 167. Moreover, in analyzing the prudential ripeness doctrine, the Court in *Susan B. Anthony List* referenced *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). And in *Lexmark*, the Court acknowledged that, while it has placed the zone-of-interests test "under the 'prudential' rubric in the past, it does not belong there" because "[w]hether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 572 U.S. at 127 (citation omitted). *Susan B. Anthony List* therefore sheds no light whatsoever on the continued validity of the zone-of-interests requirement.

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[4] Many of the cases cited by Plaintiffs and the Local Government Intervenor-Defendants are not to the contrary. Some cases, for example, allege financial injury in the context of a post-census count challenge. *See, e.g.*, *Carey v.* Klutznick, 637 F.2d 834 (2d Cir. 1980); City *of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551 (S.D. Ga. 1983). In others, plaintiffs submitted affidavits to support assertions of standing. *See, e.g.*, *Dep't of Commerce*, 525 U.S. at 324 (discussing submission of affidavit in *Glavin*, 19 F. Supp. 2d 543)); *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 49, 50 (E.D.N.Y. 1989).

To the contrary, the Supreme Court in *Lexmark* recently reaffirmed the validity of the zone-of-interests test, describing it as a "requirement of general application" that is "presumed" to apply to all causes of action unless "expressly negated." *Lexmark*, 572 U.S. at 129 (quotations omitted). In the APA context, the requirement asks whether "the plaintiff's interests are so marginally related to or inconsistent with the purposes" of the provision that they are not even "arguably" covered. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399-400 (1987). The requirement, however, applies more strictly where a plaintiff seeks to sue directly under the Constitution rather than the APA; in that context, the Supreme Court has essentially equated the test to the stringent requirement for implying "a private right of action under a statute." *Clarke*, 479 U.S. at 400 n.16. Plaintiffs bring claims under both the APA and the Constitution directly; the zone-of-interests requirement applies to all of those claims to the extent Plaintiffs rely upon alleged financial injury as a basis for bringing the claims.

Plaintiffs alternatively argue that they meet the zone-of-interests requirement because the Census Clause not only apportions representatives, but also "direct Taxes." Pls.' Opp'n at 15 (quoting Const. art. I, § 2, cl. 3). Nowhere in their Complaint, however, do Plaintiffs allege that the inclusion of illegal aliens will somehow affect any direct taxes imposed by the federal government, let alone in a manner that cognizably affects Alabama. In short, Plaintiffs' claim that they have standing due to financial injury fails.

CONCLUSION

This Court should dismiss this lawsuit for lack of jurisdiction.

Dated: February 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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