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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF SAN JOSE, CALIFORNIA, *et al.*, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**
STATE OF CALIFORNIA, *et al.*, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 5:20-cv-05167-LHK-RRC-EMC No. 5:20-cv-05169-LHK-RRC-EMC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiffs in this lawsuit seek to challenge the implementation of the Presidential Memorandum, even though the Government has not yet determined the extent to which illegal aliens can be excluded from the apportionment base and, therefore, the extent to which the Presidential Memorandum can be implemented. As Defendants explain at length in their opening brief, this premature challenge simply is not appropriate for adjudication by this Court under long-established principles of ripeness and Article III standing. There will be a time for Plaintiffs to bring their challenge; now is not it. Until the Presidential Memorandum is actually implemented, this Court should decline Plaintiffs' invitation to engage in speculation and hypotheticals.

Even if Plaintiffs were able to demonstrate that jurisdictional and prudential concerns counseled in favor of considering their challenge now, Plaintiffs have not stated any claim entitling them to relief. Plaintiffs assert that the Presidential Memorandum violates the Apportionment Clause, is *ultra vires*, and fails to comply with constitutional separation of powers. In so arguing, however, Plaintiffs disregard entirely the fact that Congress delegated to the President the discretion to determine who constitutes an "inhabitant" for purposes of apportionment.

Finally, Plaintiffs offer scant justification for the extraordinary relief they request. As Defendants have explained—and as Plaintiffs fail to rebut—declaratory relief is simply not an available remedy against the President of the United States. Indeed, the precedent Plaintiffs rely on to argue otherwise counsels against issuing declaratory relief in this case. Nor may Plaintiffs enjoin the Memorandum's implementation. Aside from failing to demonstrate imminent and irreparable harm, Plaintiffs once again offer no argument in support of the remaining injunction factors other than to assert that they should prevail on the merits. Plaintiffs therefore fall well short of demonstrating entitlement to a permanent injunction.

ARGUMENT

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

A claim is unripe "'if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (citation omitted). But Plaintiffs' apportionment claims are premised entirely on a

"contingent future event[] that may not occur as anticipated." As Defendants have explained, "[b]ecause 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 any, some, or all illegal aliens from the apportionment base." Defs.' Notice of Mot. and Mot to Dismiss, or in the alternative, Mot. for Partial Summ. J., ("Def. Mem.") at 7, Cal. ECF No. 61.

With respect to supposed apportionment injuries, the Southern District of New York panel entertaining parallel litigation got it right. "[A]s of today," that court explained, "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." *New York v. Trump*, No. 20–cv–5770, -- F. Supp. 3d --, 2020 WL 5422959, at *15 (S.D.N.Y. Sept. 10, 2020), *appeal filed*, No. 20–366 (S. Ct. docketed Sept. 22, 2020) ("*New York*").[1] And "[i]n the absence of that information," the *New York* plaintiffs' supposed apportionment harm "is likely 'too speculative for Article III purposes.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). As Defendants have explained, Plaintiffs' apportionment claims here are thus unripe as they depend upon contingent future events that may not occur as anticipated or may never occur at all. *See* Def. Mem. at 7 (citing *Mont. Env't Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190 (9th Cir. 2014)).

Plaintiffs' attempt to analogize this case to *City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018), likewise fails. *See* Pls.' Reply in Supp. of Mot. for Partial Summ. J. and in Opp'n to Defs.' Mot. to Dismiss, or in the Alternative, Mot. for Partial Summ. J., ("Pl. Opp.") at 3–4, Cal. ECF No. 62. That case concerned an executive order that limited the federal government's potential action to that "consistent with law." *San Francisco*, 897 F.3d at 1232–33. The court held that those three words did not rescue the order's constitutionality. *San Francisco* was wrongly decided, *see generally id.* at 1245–50 (Fernandez, J., dissenting), but even assuming, *arguendo*, that *San Francisco* bound this three-judge court, it only supports Defendants here. "The

[1] To be sure, the *New York* panel got much wrong. The Jurisdictional Statement that Defendants filed in their Supreme Court appeal to the *New York* decision is available at https://www.supremecourt.gov/DocketPDF/20/20-366/154588/20200922095815714_Trump%20v.%20New%20York%20Jurisdictional%20Statement%20a.pdf.

interpretation of" the Memorandum "begins with its text, which must be construed consistently with [its] object and policy." *Id.* at 1238 (citations omitted). Here, the Memorandum—in no fewer than four places—expressly conditions its implementation of the stated policy: (i) to the extent feasible; (ii) to the extent practicable; (iii) to the extent afforded by the President's discretion; and (iv) only as consistent with applicable law:

- "[I]t 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*."
- "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*."
- "[T]he 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 . . . this memorandum."
- "This memorandum shall be implemented *consistent with applicable law* . . . ."

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 21, 2020) (emphases added). These express, repeated conditions—three of which are made in the same breath as the statement of policy and the directive—are a far cry from the three words at issue in *San Francisco*. *See* 897 F.3d at 1239. The Memorandum's "text," "object," and "policy," *id.* at 1238, are thus all fully aligned.

Plaintiffs' other arguments fare no better. Plaintiffs admit—as they must—that apportionment challenges are traditionally brought *after* an apportionment determination has been made. *See* Pl. Opp. at 5; Def. Mem. at 8. Instead of identifying a case to the contrary, Plaintiffs cite *Department of Commerce v. U.S. House of Representatives* to argue that "Plaintiffs do not need to prove their apportionment harms have already occurred to satisfy Article III; they need only show a 'substantial risk' that these harms will occur." Pl. Opp. at 5–6. But *House of Representatives* concerned enumeration *procedures*. Here, however, Plaintiffs are *not* challenging

the enumeration procedures themselves. In fact, in that respect *House of Representatives* only further demonstrates that this action is not ripe: The district court in that case explained that "[t]he matter . . . becomes ripe at . . . the point at which it is *certain* that the Bureau will employ statistical sampling in conducting the apportionment enumeration." *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998) (emphasis added), *appeal dismissed*, 525 U.S. 316 (1999). There, "[t]hat time [was] now." *Id.* Here, by contrast, that time is *not* now, because it is far from "certain" what methodology or methodologies the Census Bureau might employ to implement the Memorandum.

Plaintiffs also argue that Defendants' motion for a stay of judgment pending appeal in the *New York* litigation somehow undermines Defendants' justiciability arguments. Pl. Opp. at 4–5. It does not. As Defendants have made clear in that litigation, the *New York* judgment will impose an irreparable harm if it prevents the Secretary from sending a report to the President in accordance with the policy judgment set forth in the Memorandum. That does not mean that the plaintiffs' challenge there was presently justiciable—indeed, Defendants have consistently argued it is not.

Finally, Plaintiffs' prudential-ripeness arguments are not credible. Plaintiffs claim that their challenge is "purely legal" in nature. Pl. Opp. at 12. In fact, the legal analysis may differ based on what subsets of illegal aliens are, in fact, excluded because the Secretary has deemed it feasible, and the President has determined that it is practicable and within his discretion. Waiting until after the Census Bureau completes its ongoing process and determines how it may implement the Memorandum would patently "advance" the Court's "ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003). Plaintiffs also argue that "[d]elaying review" would "severely impair[]" the "redistricting process in jurisdictions throughout the country" and would "risk . . . inevitable disruption and hardship." Pl. Opp. at 13–14. But the Supreme Court has disagreed. *Utah v. Evans*, 536 U.S. 452, 463 (2002) ("Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post–2000 census congressional election."). Plaintiffs similarly claim that later review would harm "the public interest," Pl. Opp. at 13, but even

if that contention were accurate, amorphous harm to others not before the Court is entirely irrelevant. *See Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007) ("the prudential standing doctrine typically prevents us from hearing lawsuits on the basis of injuries to non-parties"). And Plaintiffs' reassurance that a preemptive decision on apportionment would not impede apportionment because "it would ensure that the apportionment is properly executed" begs the question. Pl. Opp. at 14. If the President's ultimate decision proves lawful, Plaintiffs' attempt to eliminate his discretion to make it in the first place will have indeed "impede[d] the apportionment." Def. Mem. at 7.

II. The Court Lacks Jurisdiction Because Plaintiffs Lack Standing.

Plaintiffs lack standing to challenge the President's apportionment decision for the same reasons Plaintiffs' challenge is unripe: their alleged apportionment injuries are speculative and conclusory, and there is no "substantial risk" that such harm will occur. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs' claim that they are "'highly likely' . . . to lose at least one seat in the House of Representatives," Pl. Opp. at 3, is likewise speculative because it is an assumption based on numbers yet to be determined and a decision yet to be made. It simply cannot support standing. *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992).

Lacking a sufficiently imminent apportionment injury to support standing, Plaintiffs contend that the Presidential Memorandum "is causing them *present* injuries by discouraging undocumented persons and those with whom they live from participating in the census." Pl. Opp. at 6. Defendants have explained why such an injury is speculative in the extreme, *see* Def. Mem. at 10–13, and Plaintiffs offer no persuasive arguments in response.

A. Plaintiffs Fail to Demonstrate Injury.

While Plaintiffs claim to have offered "detailed evidence that the [Memorandum] is causing widespread fear that participation in the census will lead to adverse immigration consequences," Pl. Opp. at 7, they have done nothing to show that a supposed "chilling effect" stemming from the Memorandum is anything other than conjecture. Plaintiffs point to the declaration of BAJI's Executive Director as "provid[ing] detailed evidence that the" Memorandum "is causing widespread fear that participation in the census will lead to adverse immigration consequences."

Id. Apart from positing, in wholly conclusory fashion, that the Memorandum "discourages" immigrants from responding to the census, Gyamfi Decl. ¶ 11, San Jose ECF No. 63-4, that declaration simply states that BAJI members "have expressed hesitation about participating in the 2020 Census" in *general*. *Id.* ¶ 15. Nothing in that declaration supports the proposition that the *Memorandum* will have a chilling effect, let alone a substantial chilling effect that could materially degrade the census. And it speaks volumes that—out of the millions of illegal aliens present in the United States—Plaintiffs cannot identify one illegal alien (or even recount a specific conversation with an illegal alien) who has been "chilled" by the Memorandum.

Plaintiffs continue to rely on the opinion of their expert, Matthew Barreto. *See* Pl. Opp. at 6–11. But as Defendants have noted, Dr. Barreto cannot explain away the "major finding of the 2019 Census Test was that there was no statistically significant difference in overall self-response rates between treatments." *2019 Census Test Report*, Census Bureau (Jan. 3, 2020) at ix, https://www2.census.gov/programssurveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf (Census Report); *see* Def. Mem. at 11.[2] Plaintiffs accuse Defendants of "artful characterization" in referencing the "overall" response rate, Pl. Opp. at 9, but it is the Census Report itself that describes it as such. And, as the Census Bureau's Chief Scientist, Dr. John Abowd, has made clear, Dr. Barreto's efforts to parse variations in response rates among communities is flawed because it assumes that "statistically significant self-response differentials . . . would persist after [non-response follow-ups] that resolved the status of at least 99% of all [individuals] in the 2020 Census workload." Abowd Decl. ¶ 24, Cal. ECF No. 61-1. That is to say, the actual implementation of the census, unlike the test, would effectively eliminate the variation on which Dr. Barreto focuses. Furthermore, as the Census Report notes, lower response rates may very well have been due to the fact that "2019 Census Test did not provide the same level of language support that will be available in the 2020 Census," *not* the presence of a citizenship question. Census Report at 13.

[2] Defendants never claimed that Dr. Barreto failed to consider the report, as Plaintiffs suggest, *see* Pl. Opp. at 6, but instead that he "fail[ed] to consider the *results*," Def. Mem. at 11 (emphasis added).

Disagreements about the results of report, however, are entirely beside the point because it addressed the now-abandoned citizenship question—not the Memorandum. Dr. Barreto ignores this crucial fact, suggesting that the "2019 study confirmed . . . that an environment which increases threat to non-citizens results in lower response rates on the Census." Barreto Decl. ¶ 27. But that simply begs the question whether the Memorandum creates "an environment which increases [a] threat to non-citizens." Dr. Barreto opines that the Presidential Memorandum will have an even greater impact on response rates than the citizenship question would have because it "involves more direct targeting of undocumented immigrants than did the 2019 Census Test." *Id.* ¶ 53. But such speculation is devoid of any foundation.

Finally, Plaintiffs' reliance on *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), and *National Urban League v. Ross*, No. 20-v-05799, ECF No. 96 (N.D. Cal. Sept. 10, 2020), *see* Pl. Opp. at 7, is off point. Unlike Plaintiffs' challenge here, both of those cases concerned challenges to enumeration procedures.

B. Plaintiffs Fail to Demonstrate Traceability and Redressability.

As to traceability, Plaintiffs argue that the Supreme Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), relieves them of any obligation to show that an alleged lack of responsiveness to the census is traceable to the Presidential Memorandum. *See* Pl. Opp. at 10–11. Once again, the materially different facts of this case—and the government action at issue—distinguish this case from the prior citizenship-question litigation. In that litigation, the plaintiffs "met their burden of showing that third parties will likely react in predictable ways to the citizenship question" and the Supreme Court thus upheld standing based "on the predictable effect of *Government action* on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (emphasis added). Here, however, "[t]he Memorandum is not itself directed at census respondents and appears, even in Plaintiffs' telling, to be filtered to them through third-party intermediary sources." Def. Mem. at 15. Accordingly, unlike in the citizenship-question litigation, Plaintiffs' traceability argument here is based on the effect of *third-party* action on the decisions of *other third parties*. Taken to its logical conclusion, Plaintiffs' theory is that traceability can be satisfied solely on the basis of misinformation generated by third parties, and potentially filtered

through others—the very definition of rumor. If that were the case, a plaintiff could challenge nearly any government action so long as it demonstrated that third parties misrepresented its effect. That cannot be the law.

As to redressability, Plaintiffs argue that "a ruling from this Court prohibiting Defendants from excluding undocumented immigrants would mitigate the" Memorandum's supposed "chilling effect." Pl. Opp. at 11. Plaintiffs are wrong. Insofar as anyone has been chilled from participating in the census by the Memorandum—notwithstanding that the Memorandum in no way penalizes participation—it is implausible that relief from this Court would be likely to eliminate that chill. The President has made clear that he "intends to vindicate [his] policy determination before the Supreme Court" on appeal and then "implement [that] policy decision." The White House, Statement from the Press Secretary (Sept. 18, 2020), https://go.usa.gov/xGQh2. It is implausible that a material number of otherwise-chilled persons are likely to become un-chilled by a district court decision subject to a realistic prospect of appellate reversal. *See Lujan*, 504 U.S. at 566 ("Standing is not an ingenious academic exercise in the conceivable.") (citation omitted).

Plaintiffs point to Dr. Barreto's declaration to support their redressability theory, but Dr. Barreto only proves Defendants' point. Dr. Barreto opines that "[w]hen [immigrant communities] believe the threat [*i.e.*, concern about their citizenship status] is real, they will withdraw from the Census, and when that threat has been removed, they reengage." Barreto Decl. ¶ 82; *cf.* Gyamfi Decl. ¶ 11 (contending that the Memorandum "discourages immigrants from responding to the ongoing 2020 Census because of fear that the government will identify and retaliate against them"). To the extent that members of immigrant communities believe that the Memorandum poses such a "threat," no order from this Court can "remove[]" that "threat" because it is subject to possible appellate reversal. Indeed, as the President has recently publicized, Defendants have already appealed another such order to the Supreme Court, so the possibility of appellate reversal is now concrete.

Finally, any chilling effect will no longer exist once census field operations have ended; yet the Secretary's report containing the requested information will not be completed until long after that time. Accordingly, by the time any relief this Court could issue against that report would have

coercive legal effect, the injury it is supposed to redress will no longer exist. That is the very definition of non-redressability.[3]

III. Plaintiffs Fail to State a Claim.

Were this Court to reach the merits, Plaintiffs offer no persuasive arguments demonstrating that the Memorandum violates the Apportionment Clause, or that in issuing it, the President acted *ultra vires* or in violation of constitutional separation of powers. Assuming *arguendo* that this Court has subject-matter jurisdiction, Plaintiffs' complaint should therefore be dismissed for failure to state a claim.

A. Plaintiffs Fail to State an Apportionment Clause Claim.

On its face, the Memorandum seeks to exclude illegal aliens only to the "extent feasible and consistent with the discretion delegated to the executive branch." 85 Fed. Reg. at 44,680. *See generally supra* Part I (discussing the Memorandum's various conditions). Having rushed to court before the Secretary has determined any "feasible" population to exclude—much less before any numbers have been reported by the Census Bureau, the Secretary, or the President—Plaintiffs cannot succeed simply by showing that apportionment "must include some" illegal aliens. Pl. Opp. at 21. To the contrary, "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the [law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (edits and citations omitted). In fact, the Supreme Court has specifically explained that courts "must be careful not to go beyond the [law's] facial requirements and speculate about 'hypothetical' or 'imaginary' cases" when "determining whether a law is facially invalid." *Id.* at 449–50. That is exactly what Plaintiffs improperly seek here: an advisory opinion about "hypothetical" and "imaginary" exclusions (like all illegal aliens "who eat, sleep, work, and live in a State," Pl. Opp. at 16) that may not be "feasible" to implement.

[3] Plaintiffs do not dispute that, owing to Article II's supervisory powers and the Opinions Clause, they "cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it." Def. Mem. at 32–33.

With that proper analytical framework applied, Plaintiffs cannot succeed on their facial Apportionment Clause claim.[4] *See id.* at 15 (arguing that "the Constitution forbids the *categorical* exclusion of undocumented immigrants from the apportionment base" (emphasis added)). Plaintiffs themselves tacitly concede as much. They recognize, for example, that if "illegal aliens detained in a detention facility after being arrested while crossing the border" can be lawfully excluded, then "it would be based on ordinary residency principles, not immigration status." *Id.* at 22 n.27. But that is exactly the point. As Defendants already explained, any (as-yet-unknown) exclusion of illegal aliens under the Memorandum is due to their lack of "inhabitance" or "usual residence" in the United States—concepts that may encompass the consideration of whether an alien is permitted to settle in the country or subject to removal by the government. Def. Mem. at 21–24. That is also true, as another example, if the Secretary found it feasible to exclude aliens with final orders of removal. *See id.* at 25. In that circumstance, the government has conclusively determined that those aliens must be removed from the country, thus severing their "required tie to [a] State." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

Contrary to Plaintiffs' contention, those hypothetical exclusions are not the product of a backward-looking "temporal ambiguity" that hinges exclusively on "how long or how regularly one must reside somewhere to be considered an inhabitant." Pl. Opp. at 16. The notion of "usual residence" is both backward looking and forward looking. As *Franklin* makes clear, "inhabitance" or "usual residence" can mean more "than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." 505 U.S. at 804. That is why *Franklin* approved the inclusion of "many federal employees *temporarily* stationed overseas." *Id.* at 806 (emphasis added). A federal employee who left the country to be temporarily stationed

[4] Plaintiffs do not explain how their Enumeration Clause claim differs from their Apportionment Clause claim. The Enumeration Clause requires only a person-by-person headcount rather than estimation; it does not mandate who must be included in that headcount. *See Utah v. Evans*, 536 U.S. 452, 475 (2002); *see id.* at 493 (Thomas, J., concurring in part and dissenting in part) ("[A]t the time of the founding, 'conjecture' and 'estimation' were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause."). Certainly, the use of statistical sampling could implicate the Enumeration Clause, but "any methodology or methodologies ultimately used by the Census Bureau to implement the [Presidential Memorandum] will not involve the use of statistical sampling for apportionment purposes." Abowd Decl. ¶ 23. So Plaintiffs cannot assert a cognizable Enumeration Clause claim here.

overseas still has an "enduring tie" to a State such that she may be properly *included* in apportionment, whereas another long-time U.S. resident who left the country to permanently reside elsewhere no longer has an "enduring tie" to a State and is properly *excluded* from apportionment. So too here. Illegal aliens with final orders of removal, if feasibly identified, can properly be excluded from apportionment whether they entered the United States one day, one month, or one year (or any other time) before Census Day. Looking forward, it is fully "consonant with, though not dictated by," the Constitution for the Executive to find that those aliens lack "the required tie to [a] State" and should not be represented in numbers used to apportion House seats for the next ten years. *Id.* at 804, 806.

The remainder of Plaintiffs' arguments boil down to irrelevant quibbles with history. For example, they point to the full text of the draft Apportionment Clause submitted to the Committee of Style, which cross-referenced the Direct Taxation Clause and its provision for "the whole number of free citizens and *inhabitants of every age, sex, and condition*." Pl. Opp. at 17. But that says nothing about whether the draft Direct Taxation Clause embraced a definition of "inhabitants" that included foreigners "of every age, sex, and condition" residing in the United States *in violation of federal law*. Nor can it. As Defendants previously explained, there were no federal laws restricting immigration (and hence no illegal aliens) until 1875. Def. Mem. at 26 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972)). Plaintiffs nonetheless point out that "numerous state laws *did* prohibit entry by certain persons, and yet those persons were not excluded from the census or apportionment count despite their unlawful presence." Pl. Opp. at 17–18. But even accepting plaintiffs' characterization of history for the sake of argument, that is also beside the point. The question here is whether illegal aliens *may* be excluded, not whether they *must*. And Plaintiffs have identified no evidence showing that the Framers of the Fourteenth Amendment (or of the original Apportionment Clause) *required* future generations to allocate Congressional representation on the basis of millions of aliens who remain in the country in ongoing defiance of federal law.

For similar reasons, Plaintiffs' protestation based on "more than two centuries of consistent historical practice" does not alter the analysis. Pl. Opp. at 18–19. The fact that, "[i]n 230 years, no apportionment has ever excluded undocumented immigrants on account of their legal status,"

id. at 19, does not establish that the Executive is constitutionally compelled to use that approach in perpetuity. Rather, such a practice would at most show that the Executive *may* include illegal aliens within the apportionment base under the Constitution, not that he *must*. After all, *Franklin* upheld the Executive's decision to scuttle a nearly unbroken 180-year-old practice of not allocating federal personnel stationed overseas to the apportionment base of their home States as "consonant with, though not dictated by, the text and history of the Constitution." 505 U.S. at 806; *see id.* at 792–93. There is no reason why the previous inclusion of illegal aliens in the apportionment base should be treated as more authoritative than the previous exclusion of overseas personnel abandoned in *Franklin*.

B. Plaintiffs Fail to State *Ultra Vires* or Separation-of-Powers Claims.

As Defendants have explained, 2 U.S.C. § 2a "tracks the Fourteenth Amendment's text mandating apportionment based on the 'whole number of persons in each State.'" Def. Mem. at 31 (emphasis omitted). Indeed, § 2a(a)'s directive that the President's report include "the whole number of persons in each State" (excluding untaxed Indians), 2 U.S.C. § 2a(a), repeats verbatim the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 2, which in turn modified Article I's Apportionment Clause to end the infamous three-fifths compromise, *see* U.S. Const. art. I, § 2, cl. 3. Despite this identical language, Plaintiffs argue that § 2a should be interpreted differently. Pl. Opp. at 23–24. But "if a word is obviously transplanted from another legal source," it generally "brings the old soil with it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018), *remanded*, 753 F. App'x 96 (3d Cir. 2018).

Despite this settled canon, Plaintiffs contend that § 2a's "legislative history squarely forecloses Defendants' position," suggesting that there was "an overwhelming consensus" at its enactment "that excluding undocumented immigrants would violate the Constitution." Pl. Opp. at 23. But Plaintiffs wrongly equate aliens with *illegal* aliens. At most, Plaintiffs' proffered history suggests that the 1929 Congress (like the Framers of the Fourteenth Amendment) had rejected amendments to exclude *all aliens* from the apportionment base, and that the Senate's legislative

counsel opined that such an exclusion would violate the Fourteenth Amendment. *Id.*[5] That legislative history, however, does not answer whether the 1929 Congress prohibited the President from excluding *illegal* aliens from the apportionment base. Although aliens who are "permitted to settle and stay in the country," 1 Emmerich de Vattel, *The Law of Nations*, Ch. 19, § 213 (1760), may well qualify as "inhabitants," that in no way resolves the question here: whether aliens who are *not* permitted to settle, and remain subject to *removal* by the government, nevertheless are "inhabitants" of, with an "enduring tie to" and a "'usual residence'" in, the United States. *Franklin*, 505 U.S. at 804. If Congress in 1929 meant to mandate that congressional representation be allocated on the basis of aliens who remain in the country in ongoing defiance of federal law, it presumably would have given a clearer indication that it was taking such an important step rather than merely copying into the U.S. Code the constitutional text "persons in each State," which had never been understood to compel such a result.

Plaintiffs also contend that the Memorandum violates 13 U.S.C. § 141 and 2 U.S.C. § 2a because, in their view, the Memorandum "mandates apportionment based on something other than the 'decennial census.'" Pl. Opp. at 25. But *Franklin* explicitly rejected the assertion that the Secretary's initial choices as to the contents of his report must be deemed the one true "decennial census." *See* 505 U.S. at 797 ("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.'"). Plaintiffs argue that *Franklin* does not "give[] the President authority to manipulate the census tabulation after-the-fact," Pl. Opp. at 26, but *Franklin* confirmed that the President may instruct the Secretary to "reform the census," including by changing the data considered when enumerating individuals. 505 U.S. at 797–98. "[T]he 'decennial census'" thus "still presents a moving target, even after the Secretary reports to the President" and "[i]t is not until the President submits the information to Congress that the target stops moving." *Id.* Accordingly, Plaintiffs are wrong when they contend that the tabulation based on the Residence Criteria is the only one "based on the census itself," Pl. Opp. at

[5] Plaintiffs also point to statements by three members of Congress, all of which similarly concerned aliens generally. Although Plaintiffs represent that Senator David Reed spoke about "an amendment to exclude *undocumented* immigrants," Pl. Opp. at 24 (emphasis added), the amendment at issue was one that, as Senator Reed noted, "would exclude *aliens* from the count." Doc. 87-6, 71 Cong. Rec. at 1958 (emphasis added).

25, because *Franklin* makes clear that the President has full authority to direct a different approach. *Cf. Wisconsin v. City of N.Y.*, 517 U.S. 1, 23 (1996) ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision."). And because the second tabulation is *also* based on the decennial census (and is just the result of different policy decisions), there is nothing improper about the President's decision to use that tabulation as the apportionment base.

Nor is the Memorandum *ultra vires* simply because it "direct[s] the Secretary to give the President 'two numbers.'" Pl. Opp. at 25. Again, the President can instruct the Secretary "to reform the census, even after the data are submitted to him." *Franklin*, 505 U.S. at 798. In other words, there is nothing illegal about the Secretary's transmitting two tabulations *seriatim*. The Memorandum simply streamlines that process by requesting two tabulations simultaneously. And Plaintiffs do not dispute that, owing to Article II's supervisory powers and the Opinions Clause, they "cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it." Def. Mem. at 32–33.

Finally, because the Memorandum is perfectly consistent with the statutory framework, Plaintiffs' separation-of-powers claim fails as well.

IV. Plaintiffs Are Not Entitled to the Relief They Demand.

Despite the fact that precedent forecloses their requested remedies, Plaintiffs nevertheless insist that they are entitled to declaratory and injunctive relief. Plaintiffs offer no persuasive argument in support of either form of relief.

A. Plaintiffs Are Not Entitled to Declaratory Relief Against the President.

Plaintiffs assert that declaratory relief against the President is both proper and available. *See* Pl. Opp. at 27–28. As Defendants have explained, however, the proposition that a court may issue declaratory relief against the President has been soundly rejected. *See* Def. Mem. at 35. Plaintiffs counter that *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), does not mean what it plainly says. *See* Pl. Opp. at 27–28. According to Plaintiffs, "*Newdow* did not hold that declaratory relief is never available against the President—who was not even a defendant in that case." *Id.* at 27. But the D.C. Circuit in that case could not have been clearer: "With regard to the President,

courts do not have jurisdiction to enjoin him, . . . and have never submitted the President to declaratory relief." *Newdow*, 603 F.3d at 1013. *Newdow* does not stand alone: The D.C. Circuit reached the same conclusion in *Swan v. Clinton*, when it rejected the request of a former member of the National Credit Union Administration who challenged President Clinton's decision to remove him. *See* 100 F.3d 973, 974 (D.C. Cir. 1996). As the court explained, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Id.* at 977 n.1. Though Defendants raised *Swan* in their opening brief, Def. Mem. at 35–36, Plaintiffs fail to address *Swan*, let alone distinguish it.

Decisions such as these do not stand in isolation. The Supreme Court in *Mississippi v. Johnson* noted that the judicial branch has "no jurisdiction of a bill to enjoin the President in the performance of his official duties, 71 U.S. (4 Wall.) 475, 501 (1866), and that "[a]n attempt on the part of the judicial department . . . to enforce the performance of . . . duties by the President [is] 'an absurd and excessive extravagance,'" *id.* at 499. And, more recently in *Franklin*, the Supreme Court declined a request to enjoin the President in light of *Mississippi*. *See Franklin*, 505 U.S. at 803 (plurality opinion). While these cases concerned injunctive relief against the President, that same rationale applies with equal force to declaratory relief. *See id.* at 827–28 (Scalia, J., concurring in part and concurring in the judgment) ("The President's immunity from [declaratory] relief is 'a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history'" (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)).

In an attempt to demonstrate that declaratory relief against the President is available, Plaintiffs argue that "courts, including the D.C. Circuit, have in fact issued declaratory relief against the President." Pl. Opp. at 28. But the case Plaintiffs cite in support for their proposition is a district court decision that *denied* a plaintiff's request for relief against the President. *See Citizens for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018) ("*CREW I*"), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019). As the D.C. Circuit explained in affirming that decision, "[f]or the same reasons that we decline to 'resort to mandamus' to micromanage the President's day-to-day compliance with the PRA, we shall 'not entertain [a claim] for declaratory relief.'"

Citizens for Resp. and Ethics in Washington v. Trump, 924 F.3d at 610 (quoting *Cartier v. Secretary of State*, 506 F.2d 191, 200 (D.C. Cir. 1974)). And, in any event, *CREW I* premised its reasoning (all of which is dicta in light of its holding) on *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), which, Defendants have explained in their opening brief, is cabined to relief against "purely ministerial functions" and thus has no application here. *See* Def. Mem. at 35. Plaintiffs' only other authority is the decision in the parallel *New York* proceedings, which, of course, is pending review by the Supreme Court. *See* Pl. Opp. at 28 (citing *New York*, 2020 WL 5422959, at *35).

B. Plaintiffs are Not Entitled to Injunctive Relief.

Plaintiffs acknowledge that they "have not requested injunctive or mandamus relief against the President in their motions for partial summary judgment." Pl. Opp. at 28 n.39. Plaintiffs are also not entitled to injunctive relief against any other Defendant. As discussed, Plaintiffs fail to demonstrate injury for purposes of Article III standing, *see supra* Parts I & II; they fall well short showing that such harm is *irreparable* for purposes of injunctive relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

1. Plaintiffs Cannot Establish An Irreparable Enumeration Injury.

Plaintiffs claim that they "are sustaining current and ongoing enumeration-related injuries stemming from the Order's *present* chilling effect on census response," and that such supposed harm satisfies their burden for showing irreparable injury. Pl. Opp. at 28–29. As Defendants have explained, however, Plaintiffs offer scant support for their suggestion that the Memorandum has an actual impact on responsiveness to the census. Indeed, as Defendants have noted, Plaintiffs cannot identify a single individual who has declined to respond to the census as a result of the Presidential Memorandum. Moreover, Plaintiffs' claim is based almost entirely on supposed impacts—also unproven—from the abandoned citizenship question. Unlike the citizenship question, the Memorandum in no way alters the manner in which field operations are undertaken.

But even assuming that misinformation about the Memorandum could have an actual effect on response rates—something Plaintiffs fail to demonstrate—Plaintiffs cannot show that it will

ultimately change the enumeration itself. That is because the census is designed to ensure responsiveness, and mechanisms are in place to ensure that individuals who initially decline to respond are ultimately counted. *See* Abowd Decl. ¶ 24. Plaintiffs do not contest this fact; instead, they merely complain that "none of those pre-existing protocols has been adjusted to account for the *additional* chilling effects caused by" the Memorandum. Pl. Opp. at 29. Such a retort is unresponsive, to say the least. What matters is whether the procedures the Census Bureau has in place to ensure responsiveness are effective, not whether they are specifically adjusted in response to every executive policy that could conceivably impact an individual's willingness to respond to a census questionnaire. Plaintiffs have thus failed to carry their "burden to put forth specific evidence from which the court can infer irreparable harm." *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 760 n.8 (9th Cir. 2018).

Finally, Plaintiffs contend that an injunction is warranted because "the Supreme Court's decision in" the citizenship-question litigation "held that fears and other 'predictable effect[s] of government action' are cognizable harms." Pl. Opp. at 29 (quoting *New York*, 139 S. Ct. at 2566). Plaintiffs' argument is yet another example of the question begging that informs so much of their challenge. While "*predictable* effect[s] of government action" may indeed establish entitlement to injunctive relief, Plaintiffs' conjecture concerning a supposed "chill" stemming from the Memorandum comes nowhere close to showing predictable harm. *Id.* (emphasis added).

2. Plaintiffs Cannot Establish An Imminent and Irreparable Apportionment Injury.

Plaintiffs' supposed apportionment injury is likewise foreclosed for the same reasons that it fails to satisfy Article III requirements for standing and ripeness—it is neither imminent nor irreparable. *See supra* Parts I & II.

Plaintiffs argue that they have established irreparable harm entitling them to an injunction because no remedy in law, such as damages, will be available. *See* Pl. Opp. at 29–30. To be sure, in assessing whether an injunction is warranted, courts have evaluated whether the law provides for non-equitable legal remedies before concluding that the extraordinary relief of an injunction is warranted. But even assuming than an injunction were the only relief ultimately available, that would not resolve the inquiry in Plaintiffs' favor. Plaintiffs seek to enjoin government conduct that

does not cause *irreparable* harm—the Memorandum and the pre-apportionment conduct that it directs. Plaintiffs counter that this is a question of ripeness, not whether they are entitled to an injunction, but here timing speaks to both questions. Indeed, Plaintiffs themselves acknowledge that the inquiries inform each other. *See* Pl. Opp. at 28 (referencing Plaintiffs' standing arguments in responding to Defendants' arguments against irreparable harm). The question is what conduct can, in fact, be enjoined. As precedent makes clear, apportionment injuries are *not* irreparable. *Evans*, 536 U.S. at 463 ("Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post–2000 census congressional election."). Plaintiffs can challenge—and indeed, other plaintiffs have challenged—supposed apportionment injuries after the apportionment process has completed. *See, e.g.*, *Utah*, 536 U.S. at 462; *Franklin*, 505 U.S. at 803; *Dep't of Commerce v. Montana*, 503 U.S. 442, 445–46 (1992); *Wisconsin*, 517 U.S. at 1. Plaintiffs cannot reasonably claim that any alleged harm incurred pre-apportionment cannot be challenged at a later point. Plaintiffs, therefore, have failed to show irreparable harm.

3. The Remaining Factors Weigh Against an Injunction.

Plaintiffs once again argue that the equities and public interest weigh in their favor solely because they believe that they should prevail on the merits. In so doing, Plaintiffs continue to assume that they need not demonstrate that other factors also must support injunctive relief. *See* Def. Mem. at 41–42. But "injunctive relief is not automatic, and there is no rule requiring automatic issuance of a blanket injunction when a violation is found." *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007); *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Plaintiffs' refusal to engage with the remaining factors resolves the preliminary injunction inquiry in Defendants' favor. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 917–18 (9th Cir. 2014) (Arizona waived argument against relief by failing to address the injunction factors).

As Defendants have explained, enjoining the enforcement of the Memorandum could interfere with the Department of Commerce's ability to provide the President with the data he requested. *See* Def. Mem. at 37. In so doing, it could impede the President's ability to exercise the

discretion granted to him by Congress to undertake the apportionment. *See Franklin*, 505 U.S. at 796–800. Plaintiffs provide no response to this argument, other than to reassert their belief that they should prevail on the merits. Plaintiffs have therefore failed to carry the requisite burden of showing that they are entitled to the extraordinary remedy of a permanent injunction.

CONCLUSION

For the foregoing reasons, and those addressed in Defendants' opening brief, the Court should deny the Plaintiffs' Motions for Partial Summary Judgment and grant Defendants' Motion to Dismiss, or in the alternative, Motion for Partial Summary Judgment.

Respectfully submitted,

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