**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

COMMON CAUSE, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

No. 1:20-cv-02023-CRC-GGK-DLF

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, EXPEDITED TRIAL ON THE MERITS, AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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As Plaintiffs showed in their opening brief, the Memorandum violates the Constitution and multiple federal statutes. The plain text of the Constitution and relevant statutory provisions permits no other conclusion. Contemporaneous statements of the Framers and hundreds of years of unbroken historical understanding of those texts point to the same result.

Not two weeks ago, the Government admitted as much at oral argument in a related case:

> JUDGE FURMAN: Can you identify any historical instance where the executive branch or the legislative branch or the judicial branch, for that matter, had taken the position that it would be lawful to exclude illegal immigrants from the census count or the apportionment base? …. ***Is there any instance, any support for the proposition that you are pressing here today in the historical record?***
>
> MR. JOSHI: ***We have not been able to identify any.***

Sept. 16, 2020 Supplemental Declaration of Peter A. Nelson ("Nelson Decl."), Ex. 1, at 45-46. Just days later, the panel ruled unanimously that the Memorandum is unlawful. Indeed, that court observed that the Memorandum's violation of federal statutes was "clear," and that the question was "not particularly close or complicated." *New York v. Trump*, No. 20-cv-5770, Dkt. No. 164 ("slip op.") at 5-6 (S.D.N.Y. Sept.10, 2020) (three-judge court) (Nelson Decl., Ex. 2).

There are some differences between the parties, complaints, and arguments in this case and in the *New York* case. But the core issues are the same, and the result should be the same: what the President has hastily attempted to do—in the middle of the decennial census count, no less—is unprecedented and unlawful. This Court should join the *New York* court in granting declaratory and injunctive relief to prevent the Memorandum's implementation.

## REPLY ARGUMENT AS TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

### I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

Seeking to insulate the Memorandum from judicial scrutiny, the Government sets up a bizarre Catch-22. First, it contends that Plaintiffs sued ***too soon***, because it is supposedly still

"unknown" whether the Secretary of Commerce will deliver the requested count of undocumented immigrants by December 31. Gov. Br. 7-8. But once the Secretary transmits that count to the President, leaving the final apportionment certification in his hands, it will be ***too late***, because the President is supposedly immune from injunctive or declaratory relief. *Id.* 49.

This Kafkaesque argument fails. The Government's professed ignorance about what it will do just a few short months from now cannot defeat Plaintiffs' claims—either on grounds of standing or ripeness. As Plaintiffs have shown, there is, at a minimum, a "substantial risk" that the Government will comply with the President's express demands as stated in the Memorandum. If that occurs, it is undisputed that one or more Plaintiffs will lose representation in Congress. Nothing more is needed.[1]

**A. Plaintiffs Have Article III Standing**

The Government does not dispute that only "one plaintiff must have standing to sue." Opening Br. 9. For that reason, Plaintiffs streamlined this motion by focusing on just one type of injury (which the Government calls "apportionment injury") and just a subset of the named Plaintiffs (the individual-voter Plaintiffs and Common Cause). *Id.* 9-10. Curiously, the Government devotes much of its standing discussion to theories of injury (*e.g.*, "undercount injury") and categories of plaintiffs (*e.g.*, cities) as to which Plaintiffs have not moved. Gov. Br. 13-21. Those injuries are well-pleaded and real, as the *New York* court found, *see* slip op. at 26-36—but they are not the focus of this motion. The Government, meanwhile, fails to raise any genuine dispute of fact or law that Plaintiffs' apportionment injuries satisfy Article III.

[1] That the *New York* court has enjoined the Memorandum's implementation does not affect this analysis, as standing is "assessed as of the time a suit commences." *DL v. District of Columbia*, 302 F.R.D. 1, 19 (D.D.C. 2013). Nor is this case moot, because (*inter alia*) this Court could grant broader relief than the *New York* court, or the *New York* judgment could be reversed on grounds not applicable here. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

### 1. There Is No Dispute That Implementation Of The Memorandum Would Cause Plaintiffs To Suffer Cognizable Injury-in-Fact

The Government does not dispute that when an apportionment-related policy results in a state's loss of a representative in Congress, voters in that state "undoubtedly satisf[y] the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999); *see* Opening Br. 10-11. Nor could it.

There is also no genuine dispute that, as a factual matter, implementation of the Memorandum will cause multiple voter-plaintiffs and Common Cause members to suffer the precise injury at issue in *House of Representatives*. Plaintiffs' expert Dr. Christopher Warshaw conducted a rigorous analysis showing that if the Memorandum is implemented as written, there is a ***100% chance*** that at least one of the states in which the voter-plaintiffs live (Texas, California, New Jersey, New York, and Florida), or in which Common Cause's voter-members live (all 50 states), will lose a representative. Stat. ¶¶ 60, 63; Opening Br. 11. Likewise, Plaintiffs' expert Dr. Sunshine Hillygus performed a rigorous analysis demonstrating that the only way that the Census Bureau could implement the Memorandum is through the use of unlawful sampling techniques that will diminish the accuracy of the census. Stat. ¶¶ 68-69; Opening Br. 36-41.

In its opposition, the Government virtually ignores Dr. Hillygus's work, and rather than challenging Dr. Warshaw's data or methodology, it merely argues that his conclusions are "speculative" because Defendants supposedly might not implement the Memorandum's declared policy. Gov. Br. 12, 51. Thus, there is no dispute that ***if*** the Memorandum is implemented as written, one or more Plaintiffs is certain to suffer cognizable injury-in-fact.

### 2. The Government's Argument That It Might Not Actually Exclude All Undocumented Immigrants From Apportionment Lacks Merit

The Government's only argument as to standing is that Defendants might ultimately decide not to implement the Memorandum, or not to implement it in full. *See* Gov. Br. 12. How-

ever, full implementation of the Memorandum is what the President directed and what the Government vigorously defends here. Moreover, any substantial implementation of the Memorandum will also cause apportionment harm to the Plaintiffs. It is ***the Government's*** suggestion that the Memorandum ***might not*** be implemented that is "speculative." Regardless, all that Article III requires is a "substantial risk" that the threatened injury will occur. That standard is easily met.

**a. There Is No Record Evidence That The Government Will Not Implement The Memorandum As Written**

The Government's assertion that it might not implement the Memorandum as written has no basis the record. *See* Fed. R. Civ. P. 56(c) (party opposing summary judgment must rely on "materials in the record"). The only thing the Government offers on this score is attorney argument—but that "is no substitute for evidence" and cannot "defeat a motion for summary judgment." *Enzo Biochem v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005).

The relevant evidence is as follows. The Memorandum declares on its face that it is "***the policy of the United States*** to exclude" undocumented immigrants from apportionment and proclaims the President's intent "to carry out [that] policy." Stat. ¶¶ 15, 20. As the *New York* panel noted, this is an "unambiguous directive" that "commands action." Slip op. at 61. The Memorandum also declares that "one State"—California, where some Plaintiffs reside—"is home to more than 2.2 million illegal aliens" and that the President's policy will "result in [its loss] of two or three … congressional seats." Stat. ¶ 16. Moreover, the President has declared—without reservation—that he was "***directing*** the Secretary of Commerce ***to exclude*** illegal aliens from the apportionment base following the 2020 census." Stat. ¶ 21 (emphasis added). Consistent with these clear statements, the Director of the Census Bureau testified that the Secretary of Commerce has "giv[en] [the Bureau] ***the directive … to proceed*** with the requirements of the Presidential Memorandum," and that implementation "is underway." Stat. ¶ 23 (emphasis added).

Thus, Defendants' "own words and actions" are "sufficient to support Plaintiffs' argument that there now exists a substantial threat of imminent harm…." *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 34 (D.D.C. 2019), *rev'd in part on other grounds*, 962 F.3d 612 (D.C. Cir. 2020). Indeed, "[g]iven that 'a presumption of regularity attaches to the actions of Government agencies,' [the Court] must … presume that the Secretary and Census Bureau will abide by the President's directives" and implement the declared "policy of the United States." *New York*, slip op. at 61 (citing *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001)); *see also Doe v. Trump*, 275 F. Supp. 3d 167, 205 (D.D.C. 2017).

The Government's argument to the contrary depends on the Memorandum's "savings clause" stating that its policy is to be implemented "to the extent feasible and to the maximum extent of the President's discretion under the law." Gov. Br. 7. Based on this language, the Government speculates that between now and December, Defendants may decide that it is not "feasible" to exclude some or all undocumented immigrants, or that such exclusion would violate the "law." *Id.* 7, 12. But the conjecture of the Government's lawyers that Defendants may make such a decision has no basis in the record—and absent such evidentiary basis, the mere inclusion of a savings clause "does not and cannot" alter the Court's analysis. *New York*, slip op. at 61; *see also City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1240 (9th Cir. 2018).

Consider the legality issue first. The Government has provided no declaration from anyone in the Administration stating that he or she harbors any doubts that the Memorandum's implementation in full would be lawful. *Cf. Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir. 2020) (finding that plaintiff had standing to raise a pre-enforcement challenge to a statute where DOJ "'ha[d] not disavowed any intention'" of enforcing it). To the contrary, Attorney General Barr has testified before Congress that he "advi[sed]" the President that

he ***does***, in fact, "have the power" to "exclude illegal aliens" from apportionment.[2] And far from conceding that the Memorandum's legality is in doubt, the Government's brief vigorously defends it. Gov. Br. 31-38. The notion that, between now and December, Defendants may suddenly conclude on their own that the Memorandum is unlawful is beyond fanciful.

Now consider feasibility. The only material in the record that the Government cites for its argument that it might not be feasible to implement the Memorandum is the statement of the Census Bureau's Chief Scientist, Dr. Abowd, that "the Census Bureau does not [presently] know ***exactly*** what numbers the Secretary may report to the President," and that it is therefore "impossible to assess ***precisely*** the effects of the [Memorandum] on apportionment." Abowd Aug. 19 Decl. (ECF No. 59-1, Ex. A) ¶ 15 (emphasis added) (emphasis added). But these vague truisms that the future cannot be known "exactly" and "precisely" are not competent evidence that the Government will not substantially achieve the President's stated goal. *See Camara v. Mastro's Rests. LLC*, 952 F.3d 372, 374-75 (D.C. Cir. 2020) (noting that a "conclusory" affidavit "lacking specific facts or support from the record" is "insufficient to create a genuine factual issue").

Notably, Dr. Abowd does not state that the Bureau actually harbors any concrete, non-conjectural doubts that full (or substantially full) implementation of the Memorandum will be feasible. Indeed, there is not a word in Dr. Abowd's declaration suggesting that the Bureau is not "work[ing] diligently" to exclude every single undocumented immigrant from the apportionment base, as the President has directed. *New York*, slip op. at 61. The Bureau has now been preparing to implement the Memorandum for nearly two months under Dr. Abowd's leadership; if there were any actual, non-speculative barriers to its implementation, he would know about them, and he would surely have told the Court about them. His silence speaks volumes.

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[2] *See* PBS NewsHour, *Barr says exclusion of undocumented immigrants from census does not violate Constitution*, July 28, 2020, https://www.youtube.com/watch?v=JgAbmeciNew.

**b. Even If Plaintiffs' Injuries Are Less Than Certain To Occur, The Risk They Will Occur Is Undisputedly "Substantial"**

Article III "does not" demand "that the [threatened] injury … be ***certain*** to occur." *Peterson v. Transp. Workers Union of Am.*, 75 F. Supp. 3d 131, 136 (D.D.C. 2014) (Cooper, J.). As the D.C. Circuit recently explained, "a plaintiff is not limited to establishing injury-in-fact by showing that a harm is 'certainly impending'; it may instead show a '***substantial risk***' that the anticipated harm will occur." *N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). Dr. Abowd's vague statements, even if credited as evidence, are immaterial under this standard, because they do not establish that the risk Plaintiffs' injuries will manifest is "[in]substantial."

By comparison, in *Susan B. Anthony List*, the Supreme Court found that the plaintiff had standing to bring a pre-enforcement challenge to a statute prohibiting false statements during election campaigns, "even though any future enforcement proceedings would be based on a complaint not yet made regarding a statement the group had not yet uttered against a candidate not yet identified." *Attias v. CareFirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017) (discussing *Susan B. Anthony List*). Similarly, in *Attias*, the D.C. Circuit found the plaintiffs had standing to sue the defendant over a data breach that had exposed their Social Security and credit card numbers, even though it was far from certain that the unknown hacker(s) would ever actually put their personal information to any ill use. *Id.* at 627-28.

The risk here that the Government will implement the Memorandum in less than four months—as it has repeatedly declared it intends to do—is at least as substantial as the risk that the plaintiff in *Susan B. Anthony List* would one day be prosecuted for a statement it had not yet made, or that the plaintiffs in *Attias* would "sooner or later" suffer identity theft at the hands of an anonymous hacker. 865 F.3d at 628-29; *accord In re Idaho Conservation League*, 811 F.3d

502, 509-10 (D.C. Cir. 2016) (finding sufficient risk of injury to establish standing even though the challenged project was "still in the planning stage," because the defendant "ha[d] concrete plans to proceed" and a motive to complete the project, which "would be profitable").[3]

Indeed, courts have repeatedly rejected similar arguments from government defendants seeking to defeat standing by speculating that the challenged policy may be abandoned or forborne in the future. Thus, in *House of Representatives*, the three-judge district court observed: "Although it is certainly possible that Congress may … seek to prevent the [Commerce] Department from conducting its plan to utilize sampling [in the census], there is no legal significance to this observation…. There is always the possibility that … some external event will render a case moot, but that hardly renders the litigation nonjusticiable before that event occurs." *Glavin v. Clinton*, 19 F. Supp. 2d 543, 547 (E.D. Va. 1998), *aff'd*, 525 U.S. 316 (1999).

Similarly, in a challenge to President Trump's executive order to withhold federal funding from "sanctuary jurisdictions," the district court rejected the Government's argument that the plaintiffs "lack[ed] standing" because the Government might not attempt to enforce the order against the plaintiffs. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507, 514, *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *aff'd*, 897 F.3d 1225 (9th Cir. 2018). The court held that a "credible threat" existed, based on the "language of the Executive Order" and the "public statements" of the President and other officials indicating an "intent to enforce the Order." *Id.* at 519-25. The Ninth Circuit affirmed, agreeing that the theoretical "possibility of non-enforcement [against the plaintiff counties] does not mean that the Counties lack[ed]

[3] This case is unlike *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), where the Supreme Court found the risk of future harm too speculative. There, for the feared harm to occur, a "long sequence of uncertain contingencies involving multiple independent actors" not before the court—including Article III judges—had to unfold in a highly "specific" manner. *Attias*, 865 F.3d at 626-27, 629 (distinguishing *Clapper*). Here, by contrast, Plaintiffs' injuries require only that the Defendants now before the Court implement the declared "policy of the United States."

standing." 897 F.3d at 1236-37, 1242-43. The risk here is at least as great.

In its opposition, the Government makes no serious attempt to distinguish *Susan B. Anthony List* or the long line of cases confirming that a "substantial risk" of injury is sufficient. Opening Br. 11-13. Instead, the Government "ask[s] the court to stay its hand based upon nothing more than mere speculation" that presently unknown problems with implementation may arise—"the kind of speculation typically offered by a ***plaintiff***." *House of Representatives v. Dep't of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998) (three-judge court), *aff'd*, 525 U.S. 316 (1999). Even if this speculation could establish that implementation of the Memorandum is less than a certainty, it cannot possibly demonstrate that the risk is not even "substantial."

Indeed, even if the Government ultimately chooses to exclude fewer than all undocumented immigrants—and, again, nothing in the record suggests such an intent—Plaintiffs would still be at "substantial risk" of apportionment injury. For example, the Government's brief speculates that, rather than all 10.8 million undocumented immigrants in the country, Defendants might choose to exclude only the 3.2 million persons on the non-detained docket of Immigrations and Customers Enforcement (ICE)—a population equal to four congressional seats. Gov. Br. 32 n.5. Such a partial implementation of the Memorandum ***by itself poses a 93% chance*** of causing apportionment injury to at least one voter-Plaintiff. Suppl. Warshaw Decl. ¶ 11 (Nelson Decl., Ex. 3). That is a "substantial risk" by any measure.

Meanwhile, the President's Memorandum on its face directs the exclusion of 2.2 million undocumented immigrants who live in California, at an expressly stated cost of two or three congressional seats. Stat. ¶ 16; *New York,* slip op. at 4. Surely there is a "substantial risk" that the Census Bureau will at least exclude the undocumented immigrants living in California, who are singled out in the Memorandum's text and therefore squarely in the President's sights. *See City*

*& Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1237-38 (9th Cir. 2018) (citing the President's express public attacks on California in finding a substantial likelihood executive order would be enforced against California). As the Memorandum observes, and as Dr. Warshaw confirms, that alone would likely cause apportionment injury to multiple voter-Plaintiffs. Suppl. Warshaw Decl. ¶ 9. By itself, that suffices to establish standing.

The *New York* decision briefly suggested that apportionment harms of the sort asserted here "might not satisfy" the requirement of Article III standing at this time, given the theoretical possibility that the Memorandum may not be implemented. Slip op. at 6, 36. Ultimately, however, that court did "not decide the issue," *id.* at 37, so that observation is just dicta. Instead, that court accepted the *New York* plaintiffs' second theory of harm: that the Memorandum is presently chilling participation in the census, causing (*inter alia*) the plaintiffs to divert additional resources to ensure an accurate count. *Id.* at 37. Notably, Plaintiffs here have alleged the exact same types of injuries, although they were not the basis of the instant motion. *See, e.g.*, Declaration of Karen Hobert Flynn (ECF No. 31-3) ¶¶ 7-8; Am. Compl. ¶¶ 152-159.

The *New York* court's dicta should not deter this Court from finding standing here. That court devoted only several sentences to this theory, and it did not even mention the governing legal test—the "substantial risk" standard—in its discussion. Moreover, the *New York* court's subsequent analysis actually supports a finding of standing based on the risk that the Memorandum will soon be implemented. To wit, the court observed that, because "the [Memorandum] 'unambiguously commands action,'" and because it is "presume[d] that the Secretary and Census Bureau will abide by the President's directives," there is "***more than a 'mere possibility***'" that the Census Bureau and Commerce Department will make "a legally suspect decision" (*i.e.*, will implement the Memorandum). Slip op. at 61 (emphasis added). Those are the same arguments

Plaintiffs press here. Under the Supreme Court's decision in *Susan B. Anthony List* and this Court's decision in *Attias*, that finding by the *New York* panel is enough to establish standing on a theory of apportionment injury. *See Susan B. Anthony List*, 573 U.S. at 164-65 (finding standing where "the threat of future enforcement" was "substantial" and "not 'chimerical'").

Moreover, unlike in this case, the *New York* plaintiffs did not press claims that the Memorandum would violate the Enumeration Clause and 13 U.S.C. § 195 by relying on unlawful statistical sampling.[4] Citing the severe harms posed by such techniques and their difficulty to undo after the fact, Congress has found that such claims are "sufficiently concrete and final to … be reviewable in a judicial proceeding" even before the resulting apportionment has been put into effect. 1998 Appropriations Act §§ 209(a)(8), 209(c)(2) Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note). Such a "judgment of Congress" is "instructive and important" in determining "when [an] increased risk" of injury is sufficient to satisfy Article III, and is therefore "entitled to respect." *Jeffries v. Volume Servs. Am.*, 928 F.3d 1059, 1064-65 (D.C. Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

**3. The Government Does Not Dispute Causation Or Redressability**

Plaintiffs showed in their opening brief that their impending apportionment injury is fairly traceable to the Memorandum and that an injunction and declaratory judgment prohibiting its implementation would redress those injuries. Opening Br. 14-15. The Government's opposition does not dispute either point, thereby conceding them.[5]

[4] One of the two groups of plaintiffs in the *New York* case did plead such a claim in their complaint, but it was not before the court on the plaintiffs' summary judgment motion.

[5] Instead, the Government's traceability and redressability arguments are directed toward a type of injury as to which Plaintiffs have not moved: injury caused by the Memorandum's chilling effect on census response rates. Gov. Br. 15-17. Plaintiffs address those arguments below.

### B. Plaintiffs' Claims Are Ripe

Traditionally, courts have recognized two kinds of ripeness: constitutional and prudential. As the Government acknowledges, constitutional ripeness "'is subsumed into the Article III requirement of standing.'" Gov. Br. 6. Because Plaintiffs satisfy Article III's standing requirements for the reasons discussed above, Plaintiffs' claims are also constitutionally ripe.

The Government also contends that Plaintiffs' claims are prudentially unripe. *Id.* 8-11. The Supreme Court recently suggested that, so long as a plaintiff satisfies Article III, there is no further "prudential" ripeness requirement, and that earlier decisions stating otherwise may lack "continuing vitality." *Susan B. Anthony List*, 573 U.S. at 167-68. Regardless, Plaintiffs "easily satisf[y]" the traditional standard for prudential ripeness. *New York*, slip op. at 59.

#### 1. Congress Has Determined That Challenges To Statistical Sampling Require Early Resolution

Since prudential ripeness requirements are not jurisdictional, Congress may "eliminate[]" them where it sees fit. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Here, Congress has done exactly that with respect to Plaintiffs' claims that the Memorandum violates the Enumeration Clause and 13 U.S.C. § 195 by requiring statistical sampling. As noted above, Congress found that it would be "impracticable" for courts to provide "meaningful relief" as to such claims "after [the census] has already been conducted" and declared that Census Bureau operational plans are "sufficiently concrete and final to … be reviewable in a judicial proceeding" even before implementation. 1998 Appropriations Act §§ 209(a)(8), 209(c)(2). Congress also provided that "[i]t shall be the duty" of the Article III courts "to expedite to the greatest possible extent the disposition" of any challenge to the use of statistical methods in apportionment. *Id.* § 209(e)(2).

This statute demonstrates Congress's judgment that Plaintiffs' sampling claims are ripe and "eliminate[s] any prudential concerns." *House of Representatives*, 525 U.S. at 328-29; *see*

*also Glavin*, 19 F. Supp. 2d at 547 ("[T]he 1998 Appropriations Act eliminated all prudential ripeness concerns."). The Government suggests that Congress's "concern" underlying the 1998 Appropriations Act is absent here because the statute was meant to ensure the accuracy of the "decennial enumeration," whereas Plaintiffs challenge the resulting apportionment. Gov. Br. 10. This is double-talk. As Congress recognized in the very statute at issue, "[t]he sole constitutional purpose of the decennial enumeration … is the apportionment of Representatives in Congress." 1998 Appropriations Act § 209(a)(2). Indeed, Plaintiffs in this case make the very same arguments regarding sampling that the House of Representatives, which passed the 1998 Appropriations Act, asserted in *House of Representatives* itself. Opening Br. 31-35.

**2. Controlling Authority Provides That Pre-Certification Apportionment Challenges Are Ripe for Review**

Not only has Congress spoken on the issue; both this Court and the Supreme Court have rejected the Government's argument that an apportionment challenge is not ripe in this posture. In *House of Representatives*, the Government argued that the plaintiff's challenge would become ripe "only when the President transmits to Congress in 2001 'a statement showing … the number of Representatives to which each State [was] entitled.'" 11 F. Supp. 2d at 91. This Court disagreed, holding that the plaintiffs' challenge was "now ripe for resolution," even though the President's apportionment determination was over two years away at the time. *Id.* The Supreme Court agreed that "the case [was] ripe for review." 525 U.S. at 329. The same must be true here. *See also Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C.) (three-judge court) (ruling on pre-certification challenge to apportionment), *aff'd*, 531 U.S. 941 (2000).

**3. Plaintiffs' Claims Are Ripe Under *Abbott Labs***

Finally, Plaintiffs' claims easily satisfy the traditional prudential ripeness factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court con-

sideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). As for the first factor, whether the Constitution and statutes permit the President to exclude undocumented immigrants from apportionment "presents an issue that is 'purely legal, and will not be clarified by further factual development.'" *New York*, slip op. at 60 (quoting *Susan B. Anthony List*, 573 U.S. at 167).

As for the second factor, the balance of hardships clearly favors proceeding now. As the *New York* court observed, any claim that Defendants would suffer cognizable harm from judicial intervention now "borders on frivolous." Slip op. at 60. By contrast, the harms of refusing to proceed are real and dire: the Supreme Court has observed that "it certainly is not necessary … to wait" until after apportionment has concluded to consider the type of claim presented here, "because such a pause would result in extreme—possibly irremediable—hardship." *House of Representatives*, 525 U.S. at 332. Congress, too, has found that it would be "impracticable"—if not catastrophic—for the courts to attempt to provide "meaningful relief" after the fact in a case like this one. 1998 Appropriations Act §§ 209(a)(8), 209(c)(2).

For starters, a delayed determination of the Memorandum's lawfulness would cause serious disruption to the political process. By law, many states must begin redistricting shortly after the President transmits his apportionment statement to Congress.[6] Waiting until that happens to decide this case would ensure that it is not finally resolved on appeal until well into the election cycle, after many of these redistricting deadlines have already passed, causing mass confusion

[6] Several states must begin redistricting immediately after apportionment data are released to meet interim or final deadlines. *See, e.g.*, Colo. Const. Art. V, § 44.2(1)(a) (Mar. 15 deadline to convene redistricting commission); Conn. Const. Art. XXVI, §§ 2(a), (b) (Feb. 15 deadline to appoint reapportionment committee); N.C. Gen. Stat. § 163-291(2)(a) (July 26 deadline to complete redistricting in time for candidate filing). Maine must enact ***final*** statewide plans by June 11, 2021. *See* Me. Const. art. IV, pt. 1, § 3; *id.* pt. 2, § 2; *id.* art. IX, § 24. Similarly, Delaware must ***complete*** legislative redistricting by June 30. *See* 29 Del. C. § 805. *See generally* Yurij Rudensky, Michael Li, & Annie Lo, How Changes to the 2020 Census Timeline Will Impact Redistricting, Brennan Center for Justice (May 4, 2020), https://bit.ly/3lrBpDj.

and injuring the rights of voters and political candidates across the country.

Moreover, as Plaintiffs have noted above, the Government argues that the President himself cannot be enjoined. Gov. Br. 49. While Plaintiffs disagree (*see* Point VIII, *infra*), the fact that the Government presses this argument militates in favor of finding Plaintiffs' claims ripe. If the Court were to stay its hand until the Census Bureau and the Secretary of Commerce had fully performed their part in implementing the Memorandum, and the Court were thereafter to find that the President cannot be enjoined, then there is a serious question as to whether the Court could provide meaningful relief. *Cf. Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 143-45 (1974) (finding prudential ripeness satisfied because, *inter alia*, "delay in decision w[ould] create the serious risk" that judicial review would come "too late" to "prevent" the harm).

None of the Government's authorities is to the contrary. The Government points out that several apportionment challenges have been decided after the President certified apportionment numbers to Congress. Gov. Br. 9. But none of those cases suggests, much less holds, that apportionment cases ***must*** be decided after-the-fact. What is more, in none of those cases did the Supreme Court actually rule for the plaintiffs and order reapportionment. There is, therefore, no historical precedent for how such a post-certification apportionment do-over would occur. Any argument that "prudence" requires this Court to risk plunging the nation into such a crisis for the first time is not tenable. This Court should act now, before the eggs are broken.

## II. THE GOVERNMENT'S "FACIAL CHALLENGE" ARGUMENT FAILS

Rather than making any serious attempt to defend the Memorandum as written, the Government contends that Plaintiffs have brought a "facial" challenge to the Memorandum and so can prevail only if "there is ***no*** category of illegal aliens that may be lawfully excluded from the apportionment." Gov. Br. 22 (emphasis in original). As the *New York* court had no trouble concluding, the Government is wrong. *See* slip op. at 71 n.16.

### A. Apportionment Challenges Are Not "Facial" Challenges

"When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Such a challenge "request[s] that the court go beyond the facts before it" and consider other hypothetical applications of the statute, to other people not before the Court, at other places and times. *Sanjour v. EPA*, 56 F.3d 85, 92 n.10 (D.C. Cir. 1995) (en banc). It is for this reason that courts have sometimes expressed reluctance to entertain "facial" challenges. *But see City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) (noting that facial challenges "are not … especially disfavored").[7]

This reasoning has no application to apportionment challenges like this one. Here, Plaintiffs are not seeking to vindicate the rights of non-parties to whom a statute could hypothetically be applied at some other place and time. Instead, Plaintiffs challenge a ***one-time event***—Defendants' threatened application of the Memorandum at the close of the 2020 census—which will injure Plaintiffs themselves, as well as innumerable other people, in one fell swoop. And rather than asking the Court to "go beyond the facts before it" and consider hypothetical situations that are concededly not at issue, Plaintiffs challenge Defendants' actual stated plans.

Likely for these reasons, courts have never even mentioned the "facial" vs. "as applied" distinction—let alone applied the "no set of circumstances" test—in any apportionment challenge. *See, e.g.*, *House of Representatives*, 525 U.S. 316; *Glavin*, 19 F. Supp. 2d 543; *Adams*, 90

[7] Many courts and commentators have questioned the "value" of the "as applied/facial dichotomy," finding that it is "elusive" and "has only served to confuse." *Am. Ass'n of Cosmetology Sch. v. Devos*, 258 F. Supp. 3d 50, 66 n.6 (D.D.C. 2017); *see, e.g.*, Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 920 (2011). Even the Supreme Court has observed that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the … disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

F. Supp. 2d 35. And for these reasons, the *New York* panel needed to devote only a footnote to reject this attempt to avoid the merits. Slip op. at 71 n.16.

**B. In Any Event, Plaintiffs Satisfy The Burden For Facial Challenges**

Even if the "facial challenge" framework applied here, Plaintiffs easily meet their burden. Courts have employed different tests, assessing "whether the statute lacks any 'plainly legitimate sweep,'" *Hodge v. Talkin*, 799 F.3d 1145, 1156 (D.C. Cir. 2015) (quoting *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 449 (2008)), or whether there is "no set of circumstances" in which the challenged policy would be valid, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177, 1188 (D.C. Cir. 2020). Plaintiffs satisfy either standard.

Plaintiffs contend that the Memorandum is unlawful because (1) the Constitution and federal statutes prohibit excluding United States residents from the apportionment base solely because of their immigration status; and (2) any attempt to implement the Memorandum would violate the Enumeration Clause and/or the statutory prohibition on sampling. If Plaintiffs are correct, it necessarily follows that the Memorandum has no "plainly legitimate sweep," and that there is "no set of circumstances" under which it may be lawfully implemented. *See United States v. Supreme Court of New Mexico*, 839 F.3d 888, 917 (10th Cir. 2016) ("[W]here a statute fails the relevant constitutional test … it can no longer be constitutionally be applied to anyone—and thus there is 'no set of circumstances' in which [it] would be valid.'").

The Government argues that the Memorandum must have some lawful applications because it cannot be true that "***all*** illegal aliens necessarily qualify as 'persons in each State.'" Gov. Br. 31 (emphasis in original). That is a straw man. Plaintiffs do not argue that "all illegal aliens" must be included in the apportionment base. Rather, Plaintiffs argue that undocumented immigrants whose usual residence is in the United States cannot be lawfully excluded solely because of their immigration status, as the Memorandum commands. That the Memorandum might

validly be applied to undocumented persons who would ***not*** otherwise qualify for inclusion in apportionment—such as tourists and business travelers—is irrelevant to the facial-challenge analysis. *See Patel*, 576 U.S. at 418-19 (explaining that scenarios where a challenged statute does no actual "work" are irrelevant to a facial challenge).

The Government suggests that the Memorandum has valid applications because Defendants might choose to exclude just those persons held in ICE detention facilities or those paroled from such detention pending removal proceedings. Gov. Br. 31-32. This argument has no factual basis. Defendants' declarations do not even mention these two populations, let alone suggest that the Census Bureau might exclude only them. This argument also is legally incorrect. As the Residence Rule and generations of Census Bureau practice make clear, such persons have their "usual residence" in the United States and so must be counted in the census and resulting apportionment. *See* Census Bureau, *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5535 (Feb. 8, 2018) (observing that the "usual residence" of persons housed in ICE facilities is "at the facility"). Finally, this approach is not feasible to implement. As Plaintiffs' expert, Dr. Hillygus, explains—without rebuttal from the Government—many persons held in ICE detention or paroled by ICE are in fact here legally and/or will ultimately be permitted to remain here. Hillygus Decl. ¶ 31; Suppl. Hillygus Decl. ¶ 6 (Nelson Decl., Ex. 4). Furthermore, the records concerning such persons are outdated, inaccurate, and incomplete. Hillygus Decl. ¶ 32; Suppl. Hillygus Decl. ¶ 10. For all these reasons, the proposed "lawful" application of the Memorandum to these two populations would not, in fact, be a valid one.

In support of its argument that persons detained at the border and then paroled into the United States could be validly excluded from apportionment, the Government relies on *Kaplan v. Tod*, 267 U.S. 228 (1925), a naturalization case having nothing to do with the census or appor-

tionment. There, a girl named Esther Kaplan was stopped at the border and ordered deported; however, because of the outbreak of World War I, she was allowed to live with her father in New York "until she could be deported safely." *Id.* at 229. Later, she contended that intervening events during her presence in this country had made her a citizen. The Court rejected her claim. It held that Ms. Kaplan's temporary physical entry into the United States after being stopped at the border and ordered deported did not count as an "entry" for purposes of the naturalization statute—and that, as a result, she had not become a citizen. *Id.* at 230-31.

*Kaplan* has no application here. Courts have rejected the application of *Kaplan*'s so-called "entry fiction" outside the narrow bounds of interpreting statutory immigration and naturalization laws. *See, e.g.*, *Padilla v. ICE*, 953 F.3d 1134, 1147 (9th Cir. 2020) (stating that "the entry fiction is … a fairly narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away"). The "entry fiction" has never been applied to the census or to apportionment. Indeed, Esther Kaplan herself was personally counted as a resident of New York in the 1920 census. *See* Declaration of Jennifer Mendelsohn ¶ 3, *New York v. Trump*, No. 20-cv-5770, ECF No. 149-2 (S.D.N.Y. filed Aug. 25, 2020).

Moreover, even in the narrow context where it is relevant, *Kaplan*'s "entry fiction" would apply only to a small fraction of the undocumented people in this country: those, like Esther Kaplan herself, who are actually apprehended at the border and then detained or paroled. *See* Suppl. Hillygus Decl. ¶ 11 (noting that these people constitute only a small fraction of all undocumented persons in the United States). As the Supreme Court explained in *Zadvydas v. Davis*, 533 U.S. 678 (2001), an immigrant who is ***not*** "stopped at the border" and who effects entry onto American soil—"***even illegally***"—is exempt from the entry fiction. *Id.* at 693-94 (emphasis added) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)); *see also*

*Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (applying rule to undocumented immigrant detained "25 yards from the border").

Thus, even assuming counterfactually (1) that the "entry fiction" were applicable to the conduct of the census so that those initially stopped at the border were excludable from the apportionment base, and (2) that those people could be accurately identified by the Census Bureau, what would make them excludable is not their status as undocumented persons, but the factual determination that they never established a "usual residence" in the United States. The Government may not defend against a facial challenge to the Memorandum by pointing to a subset of persons who are excludable, if at all, because of a trait different from the one on which the Memorandum actually relies. *New York*, slip op. at 71 n.16; *cf. Patel*, 576 U.S. at 418-19.

## III. THE MEMORANDUM VIOLATES THE CONSTITUTION BY EXCLUDING UNDOCUMENTED IMMIGRANTS FROM APPORTIONMENT

As Plaintiffs have shown, both Article I and the Fourteenth Amendment require that "the whole number of persons in each State" be included in the apportionment base, and undocumented immigrants are "persons." *See New York*, slip op. at 69 ("The ordinary meaning of the word 'person' is 'human' or 'individual' and surely includes [undocumented immigrants]."). Centuries of historical practice and the unbroken and uniform positions of Congress, the executive, and the judiciary all establish that proposition. *See* Opening Br. 15-23.

On its side of the ledger, the Government has nothing. It admitted as much before the *New York* panel. As that court noted: "When pressed at oral argument to cite 'any instance, any support … in the historical record' for the proposition that the President has discretion … to exclude illegal aliens from the apportionment base, [the Government's] counsel came up empty…. With admirable candor, albeit some understatement, he was compelled to concede that '[P]laintiffs' best argument is history, and that cuts the other way.'" Slip op. at 76-77.

Lacking any textual or historical support for the Memorandum's position, the Government chiefly argues that, notwithstanding what the Framers actually wrote, they could not have subjectively had "illegal immigrants" in mind. Not only is this an invalid mode of constitutional interpretation, it is false as a matter of historical fact.

**A. Immigration Restrictions Were Common In Early America**

The Government's central argument is that before 1875, there was no such thing as an "illegal" immigrant, and that the Framers of Article I and the Fourteenth Amendment therefore could not even have imagined such persons when they penned the phrase "the whole number of persons in each State." Gov. Br. 33.

As a threshold matter, this is an illegitimate method of constitutional interpretation. As the Supreme Court recently reminded us, we are governed by the enacted text—not by "the limits of the drafters' imagination." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). Thus, the enacted text of Title VII prohibits discrimination based on sexual orientation and gender identity, even though the Congress that drafted the statute in 1964 "might not have anticipated their work would lead to th[at] particular result." *Id.* Likewise, the First Amendment's enacted text protects violent video games, *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011), even though that form of speech "cannot possibly have been envisioned at the time when the First Amendment was ratified." Tr. of Oral Arg. at 37 (statement of Justice Alito), *Brown v. Entm't Merchants Ass'n*, No. 08-1448 (U.S. Nov. 2, 2010).

Moreover, the Government gives a grossly inaccurate description of history. As Justice Scalia has noted, "[t]he myth of an era of unrestricted immigration' in the first 100 years of the Republic" is just that—a myth. *Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., concurring in part) (quoting Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1835, 1841-80 (1993)). In fact, early America saw the

enactment of "numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and … freed blacks." *Id.* Thus, the Framers of Article I and the Fourteenth Amendment understood that many "persons" would be present in the states in violation of such laws. By nonetheless including ***all*** "persons in each State" in apportionment, the Framers plainly intended to count such persons.

During the Nation's first century, states regularly exercised their widely acknowledged power to exclude certain immigrant groups. For example, in 1787, the same year as the Constitutional Convention, "Georgia enacted a statute … directing that felons transported or banished from another state or a foreign country be arrested and removed beyond the limits of the state, not to return on penalty of death." Neuman, 93 Colum. L. Rev. at 1842 (citing Act of Feb. 10, 1787, 1787 Ga. Acts 40). In September 1788, while the States were still ratifying the new Constitution, Congress "adopted a resolution … recommending that the states 'pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States.'" *Id.* (citing 13 J. of Cong. 105-06 (Sept. 16, 1788)). Yet, no Framer ever suggested that such persons be excluded from the apportionment base.

Unfortunately, many of these early state immigration restrictions were race-based. Around the turn of the 19th century, a number of states prohibited the immigration of Black people from foreign countries. *Id.* at 1869 n.236.[8] Between the turn of the century and the Civil War, several new states enacted constitutional prohibitions on all immigration by Black people,

[8] See Act of Dec. 19, 1793, 1793 Ga. Acts 24 (forbidding importation of slaves from West Indies, and requiring free blacks entering state to give security for good behavior); Act of 1795, ch. 16, § 1, 1795 N.C. Acts 79, 79 (emigrants from West Indies forbidden to bring slaves or persons of color over age of fifteen); Act of Dec. 20, 1794, 1794 S.C. Acts & Resolutions 34 (barring entry of slaves or free blacks from outside U.S.); Act of Dec. 17, 1803, § 2, 1803 S.C. Acts & Resolutions 48, 49 (barring entry of slaves or free blacks from West Indies, or South America, or who have ever been resident in French West Indies).

from foreign countries or otherwise. *Id.* at 1867 n.221, 1871 n.242.[9] And in 1858, California banned "any person … of the Chinese or Mongolian races" from "enter[ing] the state." Statutes of California, 1858, ch. 313, at 295-96; *see* Jonathan Weinberg, *Proving Identity*, 44 Pepp. L. Rev. 731, 743 n.67 (2017). Again, these laws created distinct classes of people with no legal permission to live in a state and who were removable at will—yet, knowing this, the Framers of the Fourteenth Amendment still chose to count "the whole number of persons in each state."

The federal government, too, dipped its toe into the waters of immigration regulation before the Civil War. The Alien and Sedition Acts empowered the President "to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable ground to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States." *Arizona*, 567 U.S. at 420 (quoting An Act concerning Aliens, 1 Stat. 570-571 (1798)). No Framer of the Fourteenth Amendment could have been unaware of these highly "controvers[ial]" laws. *Id.*

In a related misrepresentation of history, the Government admits that the Framers of the Fourteenth Amendment expressly chose to include "the entire immigrant population of this country," including those "not naturalized," in the apportionment formula's term "persons." Cong. Globe, 39th Cong., 1st Sess. 432 (1866); Opening Br. 17-18. Faced with this inconvenient fact, the Government argues that the Framers chose to include unnaturalized immigrants only because they assumed that all such persons were on a path to full citizenship. Gov. Br. 35. Of course,

[9] *See* Ill. Const. of 1848, art. XIV (prohibiting "free persons of color from immigrating to and settling in this State"); Ind. Const. of 1851, art. XIII, § 1 ("No negro or mulatto shall come into, or settle in, the State"); Or. Const. of 1857, art. I, § 36 ("No free negro or mulatto … shall come, reside or be within this State"); Mo. Const. of 1820, art. III, § 26 (prohibiting "free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever").

that ignores the fact, discussed above, that some of them were illegally present and subject to deportation, a fact of which the Framers were surely aware.

But in addition, the Framers of the Fourteenth Amendment knew full well that many unnaturalized immigrants living in the United States could never become citizens. From the start, naturalization was restricted to "free white person[s]." *See* Naturalization Act of 1790 ch. 3, 1 Stat. 103. Non-white people remained categorically ineligible for naturalization until two years ***after*** the Fourteenth Amendment was enacted, when "aliens of African nativity and … persons of African descent" (but not those of other races) were permitted to be naturalized for the first time. *See* Naturalization Act of 1870, 16 Stat. 254. Yet, even though non-white immigrants could never become citizens at the time the Fourteenth Amendment was enacted, the Framers of the Fourteenth Amendment expressly chose to include them in the apportionment base.

In sum, contrary to the Government's blinkered presentation of history, the Framers of Article I and the Fourteenth Amendment were keenly aware that many individuals might be living in the several states against the laws of the relevant state, or even the federal government. Likewise, they were aware that many unnaturalized persons living in the several states could never become citizens, no matter how long they remained there. Against that historical background, the Framers' choice to include ***all*** "persons in each State" in the apportionment base eviscerates the Government's position that this phrase may be read to exclude persons living in a state without legal permission or persons ineligible for citizenship.

### B. Vattel's Treatise Does Not Support The Memorandum's Constitutionality

Having asserted falsely that the Framers could not even have anticipated the notion of an "illegal" immigrant, the Government turns to an irrelevant 18th century legal treatise to support its case. Citing the Founding Fathers' contemporaneous statements, the Government argues that the constitutional phrase "persons in each State" is synonymous with the phrase "inhabitants of

each State." Then, citing a definition of "inhabitant" from Emer de Vattel's 1760 treatise on the Law of Nations, the Government argues that the term "inhabitant"—and thus, the Constitution's actual phrase, "persons in each State"—must be limited to those who are present in a jurisdiction with its government's "permission." Gov. Br. 34.

This argument does not get off the ground. First, the word the Constitution actually uses is "persons," not "inhabitants"—and, as this Court has observed, the word "persons" is "not ambiguous" in the least. *FAIR v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980); Opening Br. 15-16. And second, as just discussed, the Framers were well aware that the "persons in each State" included many who were present without legal permission. If they had actually intended to exclude such people from the apportionment base, they would have said so explicitly—just as they made explicit exclusions for enslaved people and "Indians not taxed." Opening Br. 3.

Finally, it would be absurd to substitute Vattel's specialized definition of "inhabitants" for the constitutional term "persons." In the passage cited by the Government, Vattel explains that a country's "inhabitants, ***as distinguished from [its] citizens***, are ***foreigners***, who are permitted to settle and stay in the country." 1 Vattel, The Law of Nations ch. 230, § 213 (1760) (emphasis added). In other words, under Vattel's definition, the citizens of a country are ***not*** among its "inhabitants." If the phrase "persons in each State" in the Constitution's apportionment formula were replaced by Vattel's definition of "inhabitants," as the Government urges, then only "foreigners" present in the United States with permission—and not American citizens—would be counted in the apportionment base. That is obviously not what the Framers intended.

Rather, when the Founding Fathers used the term "inhabitants," they clearly meant that word in its plain-meaning sense: all persons, regardless of technical legal status, whose "usual

place of abode" is in a particular state or who "usually reside[]" in a particular state. *See* Historians' Amicus Brief 9-10; *accord Franklin v. Massachusetts*, 505 U.S. 788, 804-06 (1992) (equating the Founding-era phrases "inhabitant," "usual resident," and "usual place of abode," and noting that they "hold broad connotations," rather than narrow and technical ones).

## IV. THE MEMORANDUM VIOLATES THE STATUTES GOVERNING THE CENSUS

Although the unconstitutionality of the Memorandum is clear, the Court may choose not to reach that issue, because the Memorandum also clearly exceeds the President's authority under the statutes governing the census. *See New York*, slip op. at 62 ("We begin—and, as it turns out, end—with Plaintiffs' statutory claims.").

Preliminarily, the Government misstates the law when it contends that a claim for injunctive relief against the Executive for acting *ultra vires* in violation of statutory authority is a "Hail Mary" that "rarely succeeds." Gov. Br. 43 (quoting *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)). *Nyunt* addresses the narrow class of claims brought for "alleged statutory violations … ***when a statute precludes review***." *Id.* (emphasis added). Where, as here, there is no such statutory preclusion, courts routinely entertain claims alleging statutory violations. *See* Opening Br. 30-31; *New York,* slip op. at 68-69. As the court noted in *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63 (D.D.C. 2016), a case relied on by the Government, *ultra vires* claims are generally available when executive officers act "clearly and completely outside of their authority ***or in violation of any statute***," as Defendants have done here. *Id.* at 76 (emphasis added); *see* Gov. Br. 43.

On the merits, the Government concedes that, because the Constitution assigns the task of apportionment solely to Congress, the Executive has no authority in this area beyond what Congress has delegated to it via statute. Gov. Br. 28; *see also* Opening Br. 27-30. And, as Plaintiffs showed in their opening brief, the Memorandum exceeds that delegated authority in at least two

ways. First, regardless of whether the Constitution permits the exclusion of undocumented immigrants from apportionment, the relevant statutes plainly do not. And, second, those statutes require that the President calculate each state's apportionment based solely on the actual results of the decennial census and not on the basis of some other number.

### A. Congress's 1929 Rejection Of An Apportionment Carve-Out For "Aliens" Precludes The Government's Statutory Reading

The Government argues that because 2 U.S.C. § 2a, like Article I of the Constitution, requires apportionment on the basis of "the whole number of persons in each State," the President has the same purported discretion to import an idiosyncratic 18th-century definition of "inhabitants" into the statute as into the Constitution. Gov. Br. 44. As meritless as the Government's arguments are about the Framers' intentions in 1788 and 1868, they are even more demonstrably incorrect when it comes to Congress's intentions in 1929, when it adopted the present-day language in 2 U.S.C. § 2a. *See New York*, slip op. at 73 (noting that in interpreting Section 2a, "we look to 1929, when [it] was enacted and the words 'whole number of persons in each State' entered the statutory lexicon").

Before 1929, no legislation defined the apportionment base; instead, Congress calculated apportionment on an *ad hoc* basis after each census. In 1929, seeking to make the process "self-executing," Congress reduced the apportionment formula to statute for the first time. *Franklin*, 505 U.S. at 791-92. The legislation that it adopted provided that "the President shall transmit to the Congress a statement showing the ***whole number of persons in each State,*** excluding Indians not taxed." Act of June 18, 1929, Pub. L. No. 71-13, § 22, 46 Stat. 21, 26 (emphasis added). The 1929 Act was amended in both 1940 and 1941, but the relevant language has never been altered. *See* Act of Nov. 15, 1941, 55 Stat. 761; Act of Apr. 25, 1940, 54 Stat. 162.

Whatever was true in 1788 or 1868, by 1929, "the concept of the undocumented or illegal

alien was firmly entrenched." Historians' Amicus Br. 19. Congress had already passed laws strictly regulating and limiting immigration and providing for the deportation of "illegal" immigrants. *Id.* 17-20; *see, e.g.*, Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917); Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924). The Government does not argue otherwise, contending only that "illegal" immigration did not exist before 1875. Gov. Br. 33. "[Courts] generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988).

Indeed, Congress expressly considered the concept of "illegal" immigrants in the drafting of the 1929 Act. For example, then-Senator Hugo Black of Alabama introduced an amendment that would have required "an enumeration of aliens lawfully in the United States and of aliens ***unlawfully in the United States***." Historians' Amicus Br. 21 (emphasis added). That amendment, however, was defeated by an overwhelming margin. *Id.* The same day, Senator Frederic Sackett from Kentucky introduced an amendment that would have required apportionment to be based on "the whole number of persons in each State, ***exclusive of aliens*** and excluding Indians not taxed," but that amendment, too, was overwhelmingly rejected. *See* 71 Cong. Rec. 2065 (1929) (S. 312); Historians' Amicus Br. 20; *New York*, slip op. at 74.

These events are fatal to the Government's position that the 1929 Act somehow delegated to the President the discretion to exclude undocumented immigrants from apportionment. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441-43 (1987).

Moreover, the reason Congress rejected this carve-out, according to Senators who spoke on the issue, is that doing so would be unconstitutional, because the Constitution requires appor-

tionment to be based on the "whole number of persons." *See, e.g.*, 71 Cong. Rec. at 1962 (Sen. Wagner of New York); *id.* at 1970 (Sen. Borah of Idaho); *see* Historians' Amicus Br. 20. Indeed, Senate legislative counsel had advised the Senate 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." Senate Legislative Counsel, *Power of Congress to Exclude Aliens from Enumeration for Purposes of Apportionment of Representatives* (April 30, 1929), reprinted at 71 Cong. Rec. 1821 at 1822 (May 23, 1929) (emphasis added).

Thus, whether or not the Constitution actually demands the inclusion of "illegal" immigrants in the apportionment base, the Congress that reduced the apportionment formula to statute believed that it did, and it enacted the language at issue here on the basis of that belief. This Court, therefore, must construe that statutory language in accordance with the enacting Congress's understanding and intent, whatever the Founding Fathers or Reconstruction Congress may have meant when it used those same words. *See New York*, slip op. at 73-75.

### B. The Relevant Statutes Require The President To Calculate Apportionment Based On The Census Results Alone

The Memorandum suffers from a second fatal statutory flaw. As the Government acknowledges, the Memorandum "direct[s] the Secretary [of Commerce] to report two sets of numbers, of which the President will choose one to plug into the 'method of equal proportions.'" Gov. Br. 45 (quoting 2 U.S.C. § 2a). This is directly contrary to the relevant statutes, 13 U.S.C. § 141 and 2 U.S.C. § 2a, which require the Secretary to report to the President, and the President to transmit to Congress, a single set of numbers—namely, the "whole number of persons in each State" as "***ascertained under … [the] decennial census of the population***." 2 U.S.C. § 2a(a) (emphasis added); *accord* 13 U.S.C. § 141(a).

As the *New York* panel recently explained, the "interplay" between these provisions

demonstrates that they require apportionment to be based on the total population as ascertained by the census count itself, not on a second set of numbers created by President:

> Subsection (a) of [13 U.S.C. § 141] requires the Secretary to conduct the "decennial census of population." 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."
>
> [2 U.S.C.] 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…."
>
> 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.

Slip op. at 63 (emphasis and paragraph breaks added; internal citations omitted).

Here, as in *New York*, the Government "rel[ies] almost exclusively on the Supreme Court's decision in *Franklin* [*v. Massachusetts*]" to argue that the President is entitled to base his apportionment calculation on a "second set of figures" that differs from the actual results of the census count. *New York*, slip op. at 66; Gov. Br. 44-46. But as the *New York* court concluded, "that reliance is misplaced." Slip op. at 66. In *Franklin*, the President based his apportionment calculation on a single set of numbers that he had received from the Secretary—*i.e.*, the actual results of the decennial census count. Massachusetts challenged the Secretary's decision, as part of the census process itself, to count "overseas military personnel" as residing in "the State designated in their personnel files as their 'home of record.'" 505 U.S. at 790-91. The Government focuses on the Court's discussion of Massachusetts' Administrative Procedure Act claim—but in rejecting that claim on the ground that the Secretary's decision was not final agency action, the

Supreme Court did not suggest that the Census Act permits the Secretary to transmit two sets of numbers to the President, or that it permits the President to base his apportionment calculation on something other than the result of the census count that the Census Bureau actually conducted.

As the Government notes, *Franklin* explained that the Secretary's transmittal was not necessarily final because "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." 505 U.S. at 798. All this means is that the President, as the leader of the Executive branch, has the "authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" *Id.* at 799. But "by [the Government's] own admission, that is not what the President did here." *New York*, slip op. at 68-69. Rather, the "policy" of the Memorandum is to base the apportionment calculation on something ***different*** than the results of the actual census count to be produced by the Bureau—which, the Government's declarant concedes, ***will include*** all undocumented immigrants, counting them at the place where they usually reside.[10]

The Government made exactly this point at oral argument in *Franklin*. The Government's counsel, Deputy Solicitor General John G. Roberts, explained that, having obtained the census figures from the Secretary, "[i]t would be unlawful … [for the President] just to say, these are the figures, they are right, but I am going to submit a different statement [to Congress]." Tr. of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992). What the President had the power to do was to "direct the Secretary in the conduct of the census." *Id.* Asked point-blank whether the President could simply choose to use different numbers than the

[10] *See* Fontenot Decl. ¶ 11 ("The Census Bureau will continue to Comply with the Census Bureau's 2018 Residence Criteria …, which, as in past decennial censuses, requires each person to be counted in their usual place of residence"); *id.* ¶ 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 Criteria." (emphasis added)).

official census count prepared by the Secretary, Mr. Roberts responded: "***[U]nder the law he is supposed to base his calculation on the figures submitted by the Secretary***." *Id.* (emphasis added). By purporting to base the apportionment calculation on a set of numbers different from those "ascertained under … [the] decennial census of the population," the Memorandum violates the plain terms of 13 U.S.C. § 141 and 2 U.S.C. § 2a.

## V. THE MEMORANDUM VIOLATES THE CONSTITUTIONAL REQUIREMENT OF "ACTUAL ENUMERATION" AND THE STATUTORY PROHIBITION ON STATISTICAL SAMPLING

As Plaintiffs showed in their opening brief, even if it were theoretically lawful to exclude undocumented immigrants from the apportionment base, implementing the Memorandum would necessarily violate the Constitution's requirement that apportionment be based only on "actual Enumeration," because Defendants never conducted—or even attempted—a direct, household-by-household count of undocumented immigrants during the census process. Opening Br. 31-35. Furthermore, although Defendants have not yet disclosed the precise method they intend to use to calculate the number of undocumented immigrants in each state, Plaintiffs have shown through detailed expert declarations that the only methods potentially available would violate the statutory prohibition on statistical sampling. Opening Br. 35-40. The Government responds only in the most cursory fashion, leaving Plaintiffs' arguments and evidence materially unrebutted.

As an initial matter, the Government argues that Plaintiffs' Enumeration Clause and sampling statute claims are premised on the assumption that the Memorandum "requires the exclusion of ***all*** illegal aliens from the apportionment base." Gov. Br. 47. This argument fails for two reasons. First, it is just a rehash of the Government's standing and ripeness arguments, which lack merit for the reasons already discussed. If the Court agrees with Plaintiffs on standing and ripeness, then by definition, it has already found a "substantial risk" that the Government will implement the Memorandum, either by excluding all or substantial numbers of undocumented

immigrants. The merits question is whether that implementation will violate the Enumeration Clause and sampling statute; the Government does not respond to that question at all.

Second, ***any*** exclusion of undocumented immigrants from the apportionment base—partial or total—would violate the "actual Enumeration" requirement. That is because it is undisputed that ***none*** of the information available to the Bureau about immigration status was collected as part of the actual census process, through methods the Framers would have recognized as "actual Enumeration." Opening Br. 35-40; *see New York*, slip op. at 66 (holding that any count of undocumented immigrants generated by the Bureau "w[ould] necessarily be derived from something other than the census itself, as the 2020 census is not gathering information concerning citizenship or immigration status"). The Government does not even attempt to dispute that the Enumeration Clause forbids the use of such information in apportionment. Nor could it, given its recent concession that, for purposes of apportionment, "population is to be determined through a person-by-person headcount, rather than through estimates or conjecture." Opening Br. 33 (citing Brief in Support of Defendants' Mot. to Dismiss (ECF 155) at 30, *New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. filed May 25, 2018)).

Meanwhile, the Government dedicates only two brief sentences to the merits of Plaintiffs' statistical sampling claim. Gov. Br. 48. There, it relies entirely on Dr. Abowd's conclusory statement that "any methodology … ultimately used by the Census Bureau to implement the [Memorandum] will not involve the use of statistical sampling for apportionment purposes." *Id.* (quoting Abowd Decl. ¶ 14). The Government asserts that this supposedly "unqualified rejection" of Plaintiffs' claim creates a genuine dispute of material fact. *Id.* 48-49.

But Dr. Abowd's bare assertion that the Government "will not" use sampling does not suffice to create a genuine dispute. Plaintiffs submitted a detailed 46-page declaration from Dr.

Sunshine Hillygus, a professor of political science and public policy at Duke University and the Director of the Duke Initiative on Survey Methodology. Among her other credentials, Dr. Hillygus was from 2012–2018 a member of the Census Scientific Advisory Committee, which advises the director of the Census Bureau on scientific developments in statistical data collection. Dr. Hillygus's declaration showed in great detail that the ***only possible methodologies*** by which the Memorandum could be implemented would necessarily involve prohibited sampling. *See* Hillygus Decl., ¶¶ 16-24. For example, she surveyed all existing estimates of undocumented immigrants and showed that they rely on sampling. *Id.* ¶ 40. She also explained why the administrative records that the Census Bureau has been assembling do not contain accurate counts of undocumented immigrants and must be manipulated by sampling to be of any use. *Id.* ¶ 13. Her unrebutted conclusion: "Without an actual enumeration, there is no known method of excluding undocumented immigrants from the 2020 census count for purposes of apportionment, including the use of administrative records, that does not rely on statistical sampling." *Id.* ¶ 29.

In response, the Government says nothing except "trust us." Neither Dr. Abowd's declaration, nor any other part of the Government's proffer, responds substantively to Dr. Hillygus's detailed showing. Dr. Abowd does not point to any errors that Dr. Hillygus made in her analysis or volunteer any potentially available non-sampling methodologies that Dr. Hillygus overlooked. His "mere denial of the facts alleged in [Plaintiffs'] properly supported motion for summary judgment is not enough to meet the [Government's] burden" as the non-moving party. *Sage v. Broad. Publ'ns, Inc.*, 997 F. Supp. 49, 53 (D.D.C. 1998).

The Government also contends that summary judgment should be denied because Defendants have not yet determined ***how*** they intend to implement the Memorandum. Gov. Br. 49. But this fails to create a material dispute of fact, given the unrebutted analysis of Dr. Hillygus,

who concluded that the "how" does not matter. ***Any*** method that the Government could possibly select would necessarily rely on prohibited statistical sampling. Stat. ¶ 80. The Government cannot create a material (*i.e.*, legally relevant) dispute by pointing out that it has not yet decided which of various undisputedly impermissible methods it will use.

## VI. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

A plaintiff who prevails on the merits is entitled to a permanent injunction if it "is likely to suffer irreparable harm" without an injunction, the "balance of equities tips in the [Plaintiff's] favor," and "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20, 32 (2008). Each of these requirements is easily met here. *See House of Representatives*, 525 U.S. at 344; *New York*, slip op. at 79-82.

As Plaintiffs have shown above, if the Memorandum is implemented, Plaintiffs will suffer irreparable harm. Among other things, they will be deprived of representation in Congress to which they are entitled by the Constitution, and "a prospective violation of a constitutional right constitutes irreparable injury." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself."). Additionally, as noted above, Congress has expressly declared that apportionment injuries resulting from unlawful statistical sampling are irreparable. *Supra* at 12.

In suits against the government, because "the government's interest is the public interest," the balance-of-equities and public-interest prongs "merge." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Here, these factors overwhelmingly favor a permanent injunction. *New York*, slip op. at 80-81. There is "no public interest in the perpetuation of unlawful agency action," and there is "a substantial public interest in having governmental agen-

cies abide by the federal laws that govern their existence and operation." *Id.* (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). In particular, "the public interest … requires obedience … to the requirement that Congress be fairly apportioned, based on accurate census figures." *Id.* (quoting *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980)).

The Government does not dispute that, if Plaintiffs prevail on the merits as to any of their claims, they are entitled to a declaratory judgment. The *New York* panel recently so held, and the same reasoning applies here. *See* slip op. at 84-85 (noting that "a declaration that the … Memorandum is unlawful 'would serve a useful purpose here, settle the legal issues involved, finalize the controversy, and offer [Plaintiffs] relief from uncertainty.'" (citation omitted)).

## VII. RELIEF AGAINST THE PRESIDENT IS PROPER

Finally, contrary to the Government's arguments, relief against the President personally is proper.[11] As the Supreme Court recently reminded us, although the King of England's "'dignity' was seen as 'incompatible'" with being subjected to judicial process, "[th]e President, by contrast, is 'of the people' and subject to the law." *Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020) (quoting *United States v. Burr*, 25 F. Cas. 30, 33-34 (CC Va. 1807) (Marshall, J.)).

Of course, "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *see also Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc) ("***As a matter of comity***, 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." (emphasis added)). But "no immunity … bars every suit against the President for injunctive, declaratory, or mandamus relief." *Nat'l Treas. Empls. Union*

[11] That said, the Court may decide not to reach this question if it acts now and enjoins the remaining Defendants from taking the steps necessary to provide the President with the requested count of undocumented persons. *See New York*, slip op. at 82-83. Once the President has that count in hand, it may become strictly necessary to decide whether the President may be personally enjoined. That is all the more reason to rule now rather than wait. *See supra* at 15.

*v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974) ("*NTEU*"); *see also Saget v. Trump*, 375 F. Supp. 3d 280, 334 (E.D.N.Y. 2019) (stating the same).

At minimum, the President can be "subject to judicial injunction requiring the performance of a purely 'ministerial' duty." *Franklin*, 505 U.S. at 802-03; *see also NTEU*, 492 F.2d at 612. Here, as the Supreme Court has recognized, and as the Government fails to dispute, the President's role in calculating congressional apportionment and transmitting that calculation to Congress is a "purely ministerial" one. Opening Br. 29; *see also New York*, slip op. at 63 ("[O]nce the final decennial census data is in hand, the President's role is purely 'ministerial.'" (quoting *Franklin*, 505 U.S. at 799)). The "correction of an unconstitutional act," or one expressly proscribed by statute, is also ministerial, as "[n]o government official … possesses the discretion to act unconstitutionally" or in violation of governing statutes. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 578-79 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019). Similarly, the Government's assertion that declaratory relief is unavailable against the President is contrary to binding precedent. *See NTEU*, 492 F.2d at 615-16; *see also Knight*, 302 F. Supp. 3d at 579-80.

The Government relies on *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010), and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866), for the proposition that the courts are powerless to order relief against the President. Gov. Br. 49. But those cases simply refused to interfere with actions ***within*** the President's discretion. In *Newdow*, Plaintiffs challenged "a decision committed to the executive discretion of the President or the personal discretion of the President-elect." 603 F.3d at 1012. Likewise, in *Johnson*, Mississippi sought to "restrain [the President] … from executing" the post-Civil War Reconstruction Acts. 71 U.S. at 497; *see also id.* at 498 (expressly "limit[ing]" the Court's holding to those facts). Neither case suggests—let

alone holds—that the President is immune from injunctive or declaratory relief where, as here, he ***plainly violates*** the Constitution and governing statutes.

**ADDITIONAL ARGUMENT AS TO DEFENDANTS' MOTION TO DISMISS**

Many of the arguments in Defendants' cross-motion to dismiss have already been addressed above in the context of Plaintiffs' summary judgment motion. However, Defendants have also moved to dismiss several counts and theories of harm not directly at issue in Plaintiffs' motion. If the Court agrees with Plaintiffs that summary judgment is warranted, then it need not reach Defendants' cross-motion all. *See New York*, slip op. at 86 (denying cross-motion to dismiss "as moot"). Regardless, each claim that the Government attacks is, at minimum, pleaded with sufficient plausibility to satisfy Rule 8 and should not be dismissed at the threshold.

## VIII. PLAINTIFFS' EQUAL PROTECTION CLAIMS ARE PLAUSIBLY PLEADED

### A. Count II Is Properly Pleaded

Count II of the Amended Complaint argues that the Memorandum violates the Equal Protection Clause by inflicting vote dilution and representational harms. It has long been settled that the Equal Protection Clause prohibits government action that dilutes the weight of a voter's vote or his or her share of representation based on where he or she lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Plaintiffs have plausibly alleged that, by excluding undocumented immigrants from apportionment, the Memorandum will do exactly that. Am. Compl. ¶¶ 184-86; *see House of Representatives*, 525 U.S. at 332 (holding that "[w]ith one fewer Representative, Indiana residents' ***votes will be diluted***" (emphasis added)).

Repeating its standing and ripeness argument, the Government contends that this claim is "speculative." Gov. Br. 39. As Plaintiffs have shown, these arguments fail, even in the summary judgment context. *A fortiori*, they have no merit on a motion to dismiss, as Rule 8 imposes no "probability requirement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Relying on *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992), and *Wisconsin v. City of New York*, 517 U.S. 1 (1996), the Government also argues that Plaintiffs' vote-dilution claim fails because "the equal-population intrastate apportionment standard in *Wesberry* and *Reynolds* does not apply to interstate apportionment determinations." Gov. Br. 39. But well after the Supreme Court decided both *Montana* and *City of New York*, it held in *House of Representatives* that where voters challenge an interstate apportionment determination, the loss of a Representative constitutes unconstitutional vote dilution. 525 U.S. at 332.

Moreover, in both *Montana* and *Wisconsin*, the Supreme Court sanctioned deviations from equal population for specific reasons grounded in the Constitution. In *Montana*, the deviation was "compel[led]" by "[t]he constitutional guarantee of a minimum of one Representative for each State," no matter how small its population. 503 U.S. at 463. And in *Wisconsin*, the Court held that the Secretary of Commerce did not violate the Equal Protection Clause by implementing a policy that "focus[ed] on distributive accuracy" (*i.e.*, "getting most nearly correct the proportions of people in different [states]") rather than "numerical accuracy" (*i.e.*, getting most nearly correct the total population "at the national level"). 517 U.S. at 11, 20. As the Supreme Court found, "a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, viz., to determine the apportionment of Representatives among the States." *Id.* at 20. This case is entirely different: as in *House of Representatives*, Defendants' departure from equal treatment is not justified—let alone compelled—by any other provision of the Constitution.

**B. Count III Is Properly Pleaded**

Count III of the Amended Complaint alleges that Defendants have violated the Equal Protection Clause by taking government action that intentionally discriminates based on race, ethnicity, and/or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

The Equal Protection Clause's prohibition on invidious discrimination encompasses not only "explicit racial classifications," but also actions "neutral on their face" but motivated by discriminatory animus. *Miller v. Johnson*, 515 U.S. 900, 905 (1995). To plead animus, a plaintiff need only raise a plausible inference that an "invidious discriminatory purpose was ***a motivating factor***." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U. S. 252, 266 (1977) (emphasis added). Possible evidence includes disparate impact, the decision's "historical background," "[d]epartures from the normal procedural sequence," "[s]ubstantive departures" from past practice, and "contemporary statements" by the decisionmakers. *Id.* at 266-68.

At this threshold stage, Plaintiffs have plausibly pleaded discriminatory animus based on all of these factors. Am. Compl. ¶¶ 100-14, 149-50. The Complaint adequately alleges that Defendants' conduct will have a starkly disparate impact on Latino populations in this country (and, indeed, that this was the whole point). *See* Am. Compl. ¶¶ 5, 114, 149-51. Defendants argue that disparate impact is insufficient to state a claim for intentional discrimination, Gov. Br. 41-42, citing Chief Justice Roberts's plurality opinion in *Dep't of Homeland Security v. Regents of Univ. of California*, 140 S. Ct. 1891 (2020). But *Regents* merely applied the *Arlington Heights* factors and held that, on those facts, disparate impact alone was insufficient to state a claim. *Id.* at 1915-16. Disparate impact remains a factor relevant to alleging intentional discrimination.

More importantly, in addition to alleging disparate impact, Plaintiffs allege that the Memorandum breaks from hundreds of years of "historical background" without explanation, Am. Compl. ¶¶ 4, 81; that it came about by means of a highly unusual "procedural sequence," *id.* ¶ 92; and that the "contemporary statements" of both Dr. Hofeller, who devised the original reapportionment plan, and the President himself, who implemented it, reflect the intent to disparage and harm immigrant and Latino communities, *id.* ¶¶ 95-96, 100-14, 192.

The Government suggests that this same mix of facts was already at issue in the citizenship question cases, where the plaintiffs "'failed to prove … that a discriminatory purpose motivated Defendants' decision to reinstate" the question. Gov. Br. 42 (quoting *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019)). However, the available facts have changed substantially since that time. In particular, whereas the restoration of a citizenship question to the census had ample historical precedent, the actions taken here are concededly unprecedented in the history of our nation. Moreover, the evidence explicitly tying the Administration's reapportionment-related efforts to Dr. Hofeller's plan to empower "non-Hispanic Whites" at the expense of Latinos emerged only after that litigation concluded. Am. Compl. ¶¶ 101-10. As courts have recognized, this evidence changes the entire ballgame. *See Kravitz v. Dep't of Commerce*, 382 F. Supp. 3d 393, 397, 403 (D. Md. 2019) (granting motion for relief from final judgment on plaintiffs' Equal Protection claims on the basis of this "new evidence").

## IX. PLAINTIFFS' THEORIES OF STANDING ARE ALL PLAUSIBLY ALLEGED

Plaintiffs' Amended Complaint alleges that Plaintiffs have standing on the basis of several different types of injury. Am. Compl. ¶¶ 138-75. As already addressed, Plaintiffs have not only plausibly pleaded imminent vote-dilution injury (*i.e.*, apportionment injury); they have ***proven*** it and are entitled to summary judgment on that basis. The Government, however, argues that it is entitled to outright dismissal because none of Plaintiffs' allegations of injury is even plausible enough to satisfy Rule 8's threshold test.

The Government is wrong. At the pleading stage, the court must "accept [Plaintiffs'] well-pleaded factual allegations" regarding standing as true "and draw all reasonable inferences … in [their] favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). At this "early juncture," Plaintiffs "need not yet establish … standing by a preponderance of the evidence." *In re United*

*States OPM Data Sec. Breach Litig.*, 928 F.3d 42, 54 (D.C. Cir. 2019); *see also Attias*, 865 F.3d at 627-28 (noting the "light burden" plaintiffs bear in alleging standing "at the pleadings stage").

As discussed above, Plaintiffs' allegations of apportionment injury clearly suffice to state a plausible claim. *Cf. Alabama v. Dep't of Commerce*, 396 F. Supp. 3d 1044, 1053-54 (N.D. Ala. 2019) ("[A]t the pleading stage, the court must accept as true Plaintiffs' clear and plausible allegation that Alabama will lose a House seat if illegal aliens are included in the 2020 apportionment base…."). The same is also true of Plaintiffs' other alleged injuries.

**A. Census Undercount Injury**

Plaintiffs have alleged that the Memorandum is presently chilling participation in the census by undocumented and documented immigrants alike. Am. Compl. ¶¶ 152-67. The Government argues that these allegations are speculative; that any chilling effect is not fairly traceable to the Memorandum itself; and that this injury is not redressable. Gov. Br. 13. These precise arguments were considered and rejected by the *New York* panel, which found that the plaintiffs' allegations of undercount harm were supported both by evidence and "common sense." Slip op. at 37-58. Notably, because that court was ruling on a motion for summary judgment, not a motion to dismiss, the plaintiffs' burden was considerably more stringent than it is here.

The Government tries to shift blame for any undercount to "the publicization of the interpretations and views of politicians and special-interest groups," which they claim severs the connection to the Memorandum. Gov. Br. 15. But to satisfy traceability, Plaintiffs need not allege that the Memorandum is "the 'sole' or 'proximate' cause," or even "a 'but-for cause' of the injury." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 83 (D.D.C. 2007). As the Government concedes, Plaintiffs have alleged that the Memorandum is part of the "chain of causation" leading the undercount injury, Gov. Br. 15, and that is enough. *See New York*, slip op. at 23-24, 51-53; *Attias*, 865 F.3d at 629; *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566

(2019) (finding that plaintiffs had standing based on census undercount injury that depended on the "effect of [the challenged] Government action on the decisions of third parties").

As for redressability, the Government argues that "it is entirely speculative that there in fact exist people who, while currently deterred from participating in the census, would decide to participate if this Court granted Plaintiffs relief." Gov. Br. 17. As the *New York* court noted, this "vastly overstate[s] Plaintiffs' burden" on summary judgment—let alone here, on a motion to dismiss. Slip op. at 38. Plaintiffs' burden is merely to allege with plausibility that the "risk [of harm] would be reduced to some extent if [they] receive[] the relief they seek." *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007). As the *New York* panel found—and as the Supreme Court similarly found in the citizenship question litigation—that is the case here.

**B. Dignitary Harm Due To Invidious Discrimination**

Plaintiffs allege that the Memorandum's invidious discrimination on the basis of race, ethnicity, and national origin has caused dignitary harm to the individual-voter Plaintiffs, many of whom are of Latino ethnicity and national origin. The Government responds that because these plaintiffs "are U.S. citizens," they "will be included in the apportionment base" even if the Memorandum is implemented. Gov. Br. 17-18. Therefore, the Government asserts, they cannot suffer dignitary harm sufficient for standing. *Id.*

This misunderstands Plaintiffs' allegations. As discussed above, Plaintiffs have plausibly alleged that the Memorandum is intended to shift political power in this country from Latinos to "non-Hispanic Whites." The Memorandum's invidious discrimination does not merely target the undocumented immigrants who will be removed from the apportionment base; it targets the broader racial and ethnic communities of which those immigrants are a part, seeking to reduce those communities' power and representation as a bloc. The individual-voter Plaintiffs are members of those targeted communities, and they suffer dignitary harm when Defendants take

actions intended to harm them on the basis of race and ethnicity—even if they themselves are not removed from the apportionment base. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995) (observing that when a minority voter "resides in a racially gerrymandered district," she suffers "stigmat[ic]" harm sufficient for Article III standing, even if her own right to vote is unaffected).

**C. Harm To Organizational Interests**

The Government argues that the organizational Plaintiffs lack organizational standing (as opposed to membership standing) because they have not adequately alleged "injur[y] [to their] interest[s]" or that they "used [their] resources to counteract that harm." Gov. Br. 19.

An organizational plaintiff—just like an individual plaintiff—does not need to allege diversion of financial resources to establish injury-in-fact. *See PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (noting that "organizational standing" requires the same showing as "individual plaintiff" standing: namely, an "actual or threatened injury in fact that is fairly traceable to the alleged illegal action"). Diversion of financial resources can contribute to a finding of organizational standing—but the fundamental question is whether the challenged conduct has caused "a 'concrete and demonstrable injury to [the organization's] activities,' [as] distinct from 'a mere setback to [its] abstract social interests.'" *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1255-56 (D.C. Cir. 2018) (quoting *PETA*, 797 F.3d at 1093); *see also Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987) ("The organization must allege that discrete programmatic concerns are being directly and adversely affected by the defendant's actions.").

Each of the organizational plaintiffs has alleged that an accurate census count of immigrant communities is crucial to its organizational mission and that the Memorandum is presently harming that key organizational interest. *See, e.g.*, Am. Compl. ¶¶ 23, 169-72 (PANA); ¶¶ 13, 173-74 (Common Cause); ¶¶ 18-22, 175 (remaining organizations). While not required at this stage, Common Cause has even submitted a sworn declaration stating the same. *See* Flynn Decl.

¶¶ 6-7. And although it is not required, both PANA and Common Cause have also alleged and/or offered evidence they have "divert[ed] [their] limited resources from projects or priorities that [they] would otherwise pursue to counter the adverse effect of the Memorandum on [their] mission." Am. Compl. ¶¶ 171, 174; Flynn Decl. ¶¶ 7-8. These allegations are more than sufficient to support a plausible claim of organizational standing at this threshold stage. *Cf. New York*, slip op. at 46-50 (holding that similar harms were sufficient to establish standing).

**D. Standing Of City Plaintiffs**

Finally, the Government argues that the city Plaintiffs lack standing to sue in a *parens patriae* capacity. Gov. Br. 20-21. Although there is no question that the city Plaintiffs' residents will be harmed by the Memorandum, they do not seek to represent those residents on a *parens patriae* theory. They sue on their own behalves, because the Memorandum's implementation will cause them to lose funding and resources. *See, e.g.*, Am. Compl. ¶¶ 161-162, 166. The Government's arguments, therefore, are not responsive to Plaintiffs' allegations.

## CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment in Plaintiffs' favor with respect to Counts I, IV, and V of the First Amended Complaint. In the alternative, if the Court determines that any genuine dispute(s) of material fact prevent entry of summary judgment, the Court should order an expedited trial on the merits with respect to such dispute(s). Furthermore, the Court should deny the Government's cross-motion to dismiss in its entirety.

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