FILED
2019 Jan-25 PM 12:47
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OALABAMA SOUTHERN DIVISION

STATE OF ALABAMA, and MORRIS J. BROOKS, JR., Representative for Alabama's 5th Congressional District,

*Plaintiff*s,

v.

UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, in his official capacity as Secretary of Commerce; BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,

Defendants,

and

DIANA MARTINEZ; RAISA SEQUEIRA; SAULO CORONA; IRVING MEDINA; JOEY CARDENAS; FLORINDA P. CHAVEZ; and CHICANOS POR LA CAUSA;

COUNTY OF SANTA CLARA, CALIFORNIA; KING COUNTY, WASHINGTON; and CITY OF SAN JOSÉ, CALIFORNIA,

Defendant-Intervenors.

Civil Action No. 2:18-cv-00772-RDP

OPPONENTS' RESPONSIVE SUBMISSION IN RESPONSE TO EXHIBIT B OF THE COURT'S ORDER SUBMITTED IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MARTINEZ DEFENDANT-INTERVENORS' SUPPLEMENTAL MEMORANDUM

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INTRODUCTION

The decennial census is designed to serve "the constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788 (1992). To that end, Congress has delegated to the Secretary of Commerce the authority to conduct the census to ensure that congressional representatives and Electoral College votes are "apportioned among the several States according to their respective numbers," Const. amend. XIV, § 2. The Secretary, working with the Census Bureau, intends to include illegal aliens as part of the total number of persons allocated to each state in the 2020 census.

Plaintiffs the State of Alabama and Representative Morris Brooks brought this suit against the Secretary, the Department of Commerce, the Census Bureau, and the Bureau's Acting Director. Plaintiffs contend that both the Constitution and the Administrative Procedure Act prohibit Defendants from including illegal aliens as part of the census count. And Plaintiffs have alleged that because the vast majority of illegal aliens in the United States are found in just a handful of states, those states will enjoy outsized political power at the expense of states like Alabama that have relatively few illegal aliens. More specifically, Plaintiffs have alleged that if illegal aliens are included in the 2020 census count, Alabama is substantially likely to lose a congressional seat and Electoral College vote that the State would maintain if the census included only citizens and lawfully present aliens. Moreover, Plaintiffs have alleged that this drop in Alabama's share of the National population will also deprive the State of federal funds that are tied to the census results.

Though the Supreme Court has repeatedly held that plaintiffs raising similar claims against these same Defendants had standing to press their challenges, Defendants and one set of Intervenors contend that Plaintiffs lack standing here. In their motion to dismiss, Defendants

argue that Plaintiffs' impending losses of political representation and federal funding are "speculative" because it will be "all but impossible" for Plaintiffs to show that excluding illegal aliens from the count for all 50 states would leave Alabama better off. (*See* Doc. 45-1, p. 1).[1] But the Supreme Court has already held that plaintiffs raising a pre-count challenge to the conduct of the 2000 census were able to make such a showing. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-32 (1999). More fundamentally, Defendants' failure-of-proof argument is out of place at the pleading stage, where "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (quotations omitted). Because Plaintiffs have plausibly alleged that they face a substantial risk of harm, the Court must assume those allegations are true, and Defendants' motion thus should be denied.

The Martinez Intervenors, for their part, argue that Plaintiffs' harms cannot be redressed because even if this Court declared that it was unlawful to include illegal aliens in the census count and ordered the Commerce Department and Census Bureau to exclude illegal aliens, Congress could pass new laws negating that relief or the President could flout this Court's order by including illegal aliens in the census count anyway. (*See generally* Doc. 60). But Congress (within Constitutional limits) is always free to pass new laws that alter affairs between parties; even so, courts are not limited to granting only those remedies that an Act of Congress can never undo. And as to the President, while Justice Scalia would have held in *Franklin v. Massachusetts* that an order directed only to the Secretary and Census Bureau officials—and not the President as

[1] Citations are to page numbers the parties added to their pleadings, as opposed to page numbers added by the Court.

well—could not redress harms related to apportionment, 505 U.S. 788, 824-29 (1992) (concurring in part and concurring in the judgment), the other "Eight Members of the [*Franklin*] Court found that the plaintiff had standing," and the Supreme Court later held that Utah had standing to bring a similar suit against the same defendants who are now before this Court. *Utah v. Evans*, 536 U.S. 452, 460 (2002) (citing *Franklin*, 505 U.S. at 807). Because Plaintiffs' alleged harms here are likewise redressable, this case should proceed.

BACKGROUND

I. Constitutional and Statutory Background

The Constitution provides that Representatives "shall be apportioned among the several States ... according to their respective Numbers," art. I, § 2, cl. 3, which requires, "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To ensure "the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, the Constitution requires that this count of the population of each State consist in an "actual Enumeration" of the number of "persons" in each state conducted every ten years "in such manner as [Congress] shall by law direct," U.S. Const. art. I, § 2, cl. 3. This enumeration also determines the number of electors in the Electoral College to which each State is entitled, as each state is entitled to "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in Congress." *Id.* art. II, § 1, cl. 2.

Congress has delegated the responsibility to conduct the required enumeration to the Secretary of Commerce. The statute governing the conduct of the census provides that the Secretary "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. § 141(a). This "tabulation of total population by States … as required for the apportionment of Representatives in Congress among

the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). After receiving the Secretary's report, the President is required to "transmit to the Congress a statement showing the whole number of persons in each State … as ascertained under the … decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions…." 2 U.S.C. § 2a(a). "Each State shall be entitled … to the number of Representatives shown" in the President's statement, and the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

In addition to allocating political power, the census helps allocate numerous streams of federal funding that are pegged to the census's final tallies for each State. *See, e.g.*, 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5307, 5340; 45 C.F.R. § 98.63; *see also* Doc. 1, ¶¶ 73-81. Indeed, Congress has recognized the longstanding and widespread use of the census "for the purpose of administering" federal laws "in which population or other population characteristics are used to determine the amount of benefit received by State, county, or local units of general purpose government …." 13 U.S.C. § 183(a). Congress thus requires the Secretary to "transmit to the President for use by the appropriate departments and agencies of the executive branch the data most recently produced and published under" the laws governing the census. *Id.*

The U.S. Census Bureau is an agency within the Department of Commerce. 13 U.S.C. § 2. The Secretary has delegated to the Census Bureau the authority to establish procedures for conducting the census. *Id.* § 4.

II. Procedural History

On February 8, 2018, the Census Bureau issued the 2020 Residence Rule, which will govern how the Census Bureau and Department of Commerce conduct the census, tally the population, and allocate individuals to each State. *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 ("Residence Rule"). The Residence Rule provides that aliens who are unlawfully present in the United States will be counted in the 2020 census and allocated to a state's final count just like U.S. citizens and lawfully present aliens. As a result, states with large illegal alien populations stand to gain greater representation in the U.S. Congress and Electoral College, and those states likewise stand to obtain a greater proportion of federal funds that are tied to a state's proportion of the national population.

On May 21, 2018, Plaintiffs the State of Alabama and Morris Brooks—a member of the U.S. House of Representatives and a registered voter in the State of Alabama—initiated this suit against the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau. (*See generally* Doc. 1). Plaintiffs contend that Defendants' decision to include illegal aliens in the final census count is unconstitutional, (*see, e.g.*, Doc. 1, ¶¶ 87-123, 140-48), and unlawful under the Administrative Procedures Act, (*see, e.g.*, Doc. 1, ¶¶ 124-139, 149-57), and that Defendants therefore must exclude illegal aliens from the final census allocations for each State.

Plaintiffs have alleged that they face a substantial risk of harm from Defendants' actions. (Doc. 1, ¶¶ 50-86). If Defendants include illegal aliens in the population allocations for each state and the Secretary includes those allocations in his report to the President showing the population totals for each state, the President will almost certainly include illegal aliens in the apportionment base when the President "transmit[s] to the Congress a statement showing the whole number of

persons in each State, excluding Indians not taxed, as ascertained under the … decennial census of the population," which will determine "the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a); *see also id.* § 2(a)(b); Doc. 1, ¶¶ 16-28; *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (concluding that "a new 'report'" from the Secretary to the President "contain[ing] a different conclusion about the relative populations of" states would make it "substantially likely" that that conclusion would be reflected in the final census figures and apportionment of representatives).

And Plaintiffs have alleged that because a disproportionate percentage of illegal aliens in the United States are found in only a few states and Alabama is not one of those states, Defendants' decision to include illegal aliens in the census count will decrease Alabama's proportionate share of the National population to the point that Alabama and its voters will lose a congressional representative and a vote in the Electoral College. (Doc. 1, ¶¶ 50-57). Conversely, if illegal aliens are not included in the census count, Alabama's proportionate share of the National population will remain high enough that Alabama will retain seven representatives in Congress and nine Electoral College votes. (Doc. 1, ¶¶ 58-59).

Likewise, because including illegal aliens in the census count decreases Alabama's proportionate share of the National population, Defendants' actions will harm Alabama by diminishing the share of federal funding the State otherwise would have received under a census count that does not include illegal aliens. (Doc. 1, ¶¶ 73-81).

As a remedy, Plaintiffs ask the Court to (a) declare the Residence Rule unlawful because it includes illegal aliens in the census count; (b) declare that any apportionment by the Secretary that does not use the best available methods to exclude illegal aliens from the population figures used to apportion congressional seats and Electoral College votes among the states is unconstitutional;

(c) vacate and set aside the Residence Rule insofar as it permits or requires the Census Bureau to include illegal aliens in the population figures used for apportionment; (d) remand to the Commerce Department and Census Bureau to permit the Defendants to issue rules that comply with the Constitution, the APA, and governing statutes; and/or (e) award Plaintiffs such additional relief as the Court deems appropriate. (Doc. 1, ¶ 158).

ARGUMENT

Article III courts have power to adjudicate only "Cases" and "Controversies." Art. III, § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quotations omitted). To do so, plaintiffs must show that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Plaintiffs must support each of these three elements "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quotations omitted). Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts"—including jurisdictional facts—"is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (quotations omitted).

At this early stage of litigation, Plaintiffs have met their burden of pleading allegations that are sufficient to demonstrate a (1) "substantial risk" that plaintiffs will suffer concrete,

particularized, and actual harms if defendants include illegal aliens in the 2020 census count, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); (2) that this harm is traceable to defendants' conduct; and (3) that an order from this Court requiring defendants to exclude illegal aliens from the 2020 census's state population counts "would likely redress (at least in part) the plaintiffs' injury," which "is enough for standing purposes." *I.L. v. Alabama*, 739 F.3d 1273, 1282 (11th Cir. 2014); *see also Utah*, 536 U.S. at 463-64 (holding that Utah had standing to challenge Secretary's allocation of populations in census report because "the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered").

I. Plaintiffs Have Sufficiently Alleged A Substantial Risk That They Will Be Harmed By Defendants' Actions.

Plaintiffs have alleged that if Defendants include illegal aliens in the upcoming census count, Plaintiffs will suffer both representational and financial harms when Alabama is assigned a smaller percentage of the National population than the State would have received had illegal aliens not been included in the census count. Any decrease in the State's proportional share of the National population creates a substantial risk the State will lose federal funding it would have otherwise received. And because the drop in the State's share of the National population will be particularly steep, Alabama faces a substantial risk that it will lose a seat in the House of Representatives and a vote in the Electoral College.

A. Plaintiffs Have Sufficiently Alleged Representational Harm.

The Supreme Court has repeatedly held that the loss of a representative based on the conduct of the census is the sort of concrete, particularized, and actual harm sufficient to confer standing. For example, in *Department of Commerce v. U.S. House of Representatives*, plaintiffs

challenged the Census Bureau's "plan to use two forms of statistical sampling" in the 2000 census. 525 U.S. 316, 320 (1999). An Indiana resident alleged that Indiana was likely to lose a congressional seat if the sampling methods were employed in the upcoming census, *id.* at 330-31, and the Court held that this "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing," *id.* at 331. As the Court explained, "[w]ith one fewer Representative, Indiana residents' votes will be diluted. Moreover, the threat of vote dilution through the use of sampling is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* at 332 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The Court likewise held that other plaintiffs had standing to challenge the Census Bureau's sampling methods because it was "substantially likely that" the counties in which those plaintiffs resided would have a proportionately lower count under the Bureau's proposed method than under another method that did not employ sampling. *Id.* at 333. Likewise, in *Utah v. Evans*, the Supreme Court recognized Utah's standing to challenge the method the Secretary and Census Bureau officials used to arrive at the final census count on the ground that defendants' methods would cost Utah a seat in Congress. 536 U.S. at 459-64. And in *Franklin v. Massachusetts*, "[e]ight Members of the Court found that the plaintiff had standing," to bring a similar challenge. *Utah*, 536 U.S. at 460 (citing *Franklin*, 505 U.S. at 803, 807). Plaintiffs here have alleged similar harms based on similar conduct by the same defendants. Those harms are sufficient to satisfy Article III's injury-in-fact requirement.

Defendants nevertheless argue that Plaintiffs have not alleged a sufficiently concrete and particularized harm because "Plaintiffs merely assert that including illegal aliens 'will *likely* result' in a loss of representation." (Doc. 45-1, p. 7 (quoting Compl. ¶ 50) (emphasis added by Defendants)). But when a case concerns "future injury," such allegations "may suffice if … there

is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (quotation omitted). Thus, the plaintiffs in *U.S. House of Representatives* had standing, even though the census had not yet been conducted, and plaintiffs could allege only *likely* harm. *See* 525 U.S. at 330-32. And Plaintiffs here have sufficiently alleged a substantial risk of harm by pleading that Alabama will lose a congressional seat, an Electoral College vote, and federal funding if illegal aliens are included in the 2020 census. (*See* Doc. 1, ¶¶ 50-81).

Defendants next contend in a footnote that Plaintiffs fail to "plausibly allege how" uneven distribution of "the illegal alien population … affects Alabama in comparison to other states." (Doc. 45-1, p. 7 n.3). But that assertion is belied by Plaintiffs' complaint. As Plaintiffs explain, reports from the U.S. government show that at least 11 million illegal aliens resided in the United States in 2010 and that this number has increased or held steady for most of the last decade. (Doc. 1, ¶ 30). Plaintiffs further explain that most of these aliens are concentrated in just a handful of states, such that including illegal aliens in the census count would so increase those states' proportion of the National population and so diminish Alabama's that Alabama would lose a congressional representative and Electoral College vote. (Doc. 1, ¶¶ 34-47, 50-59, 62-72). These allegations explain how Defendants' "prospective" actions "present[] a realistic and impending threat of direct injury." *Davis v. FEC*, 554 U.S. 724 (2008). Nothing more is presently required.

Finally, Defendants contend that Plaintiffs' alleged injury is "speculative" because it will purportedly be "impossible" to determine whether Alabama will be harmed by including illegal aliens in the census count until after the count has been completed. (Doc. 45-1, p. 8). But Defendants' predictions about Plaintiffs' ability to muster evidence are no basis for dismissal, for "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556. Indeed, there is no "probability requirement at

the pleading stage," and thus "a well-pleaded complaint may proceed even if it appears that a recovery is very remote and unlikely." *Id.* (quotation omitted). Plaintiffs have stated a plausible case for how they will be harmed by Defendants' actions, and Plaintiffs should have a chance to prove their case.

Defendants point to three census challenges that were rejected for lack of standing, but these decisions only underscore the premature nature of Defendants' arguments as each case was decided only *after* plaintiffs were given the opportunity to present evidence regarding their claims. (*See* Doc. 45-1, pp. 8-9). First, in *Federation for American Immigration Reform v. Klutznick*, the court allowed the case to proceed to summary judgment, and plaintiffs submitted evidence "showing their estimation of the effects on congressional apportionment given a variety of different possible assumptions about the illegal alien population." 486 F. Supp. 564, 571 (D.D.C. 1980). Only after finding that this evidence "failed to demonstrate with requisite specificity" whether plaintiffs would be harmed did the court dismiss their suit. *Id.* at 572.

The plaintiffs in *Ridge v. Verity* also challenged the inclusion of illegal aliens in the census count. 715 F. Supp. 1308, 1310 (W.D. Pa. 1989). While the court held that they lacked standing, it did so at the summary judgment stage and only after considering plaintiffs' evidence, which the court concluded fell short of establishing a concrete harm. *Id.* at 1313-18.

Finally, in *Sharrow v. Brown*, the plaintiff's challenge to the census count failed because he "introduced no evidence that New York's loss of six representatives over the past thirty years is the result of anything other than shifts in population." 447 F.2d 94, 97 (2d Cir. 1971). Plaintiffs here have not yet had a chance to prove that they face impending harm, and the Court should not simply assume Plaintiffs will be unable to do so.

In sum, none of Defendants' cases involved dismissal of a census challenge at the pleading stage. And whatever purchase those cases once had is greatly diminished in light of the Supreme Court's later decision in *U.S. House of Representatives*, in which the Court held that plaintiffs were able to establish standing to challenge the proposed method for conducting the 2000 census. "Utilizing data published by the Bureau, [plaintiffs' expert] projected year 2000 populations and net undercount rates for all States under the 1990 method of enumeration and under the Department's proposed plan for the 2000 census." 525 U.S. at 330. Because "these projections" showed that Indiana would almost certainly lose a seat under the Department's plan, plaintiffs established standing. *Id.* Thus, it clearly is possible to prove harm based on a yet-to-be-conducted census, and Plaintiffs are entitled to a chance to do so here.

B. Plaintiffs Have Sufficiently Alleged Financial Harm.

Plaintiffs also have standing because they have adequately alleged a financial harm to Alabama that will follow if Defendants include illegal aliens in the census count and thereby decrease Alabama's proportionate share of the National population. As Plaintiffs allege (*see* Doc. 1, ¶¶ 73-81) and as the statute governing the census recognizes, *see* 13 U.S.C. § 183, numerous federal programs allocate funding to the states based on their proportionate share of the National population as determined by the census.[2] And because including illegal aliens in the census count will decrease Alabama's proportionate share of the National population, Defendants' actions will

[2] A recent Census Bureau report found that 132 federal programs used Census Bureau data to distribute more than $675 billion in funds during fiscal year 2015. U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* at 3 (Sept. 2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/ Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf (last visited Jan. 24, 2019).

harm Plaintiffs by decreasing Alabama's share of many of these federal funding streams. This is no novel theory. Rather, "a number of courts have found such claims sufficient to establish injury-in-fact." *Kravitz v. U.S. Dep't of Commerce*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (citing *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980)). Indeed, even the Local Government Intervenor-Defendants in this case have stated that "Plaintiff State of Alabama has plausibly alleged Article III standing in connection with its claims—based on its asserted financial injury." (Doc. 59, p.1).

Defendants first contend that such financial harms are "too speculative to support standing" because Plaintiffs will have too hard a time proving what the census will show, (Doc. 45-1, p.10), but as explained above, this failure-of-proof argument carries no weight at the pleading stage. *See supra* pp. 10-11.

Next, Defendants and the Martinez Intervenors briefly contend that Plaintiffs have not pleaded the State's financial harm with sufficient specificity, (*see* Doc. 45-1, pp. 10-11; Doc. 60, pp. 7-8), but Plaintiffs have indeed alleged how "the prospective operation of" federal statutes and Defendants' census count together "present[] a realistic and impending threat of direct injury" to Alabama through a drop in federal funding if illegal aliens are included in the 2020 census count. *Davis*, 554 U.S. at 734. Plaintiffs identify three of the numerous federal programs that peg funding to census numbers, Plaintiffs allege that Alabama participates in these programs, and Plaintiffs plausibly allege that "Alabama will lose federal funding that it would have received if illegal aliens had been excluded from the census." (Doc. 1, ¶ 81).

Defendants assert that "Plaintiffs have not calculated whether the inclusion of illegal aliens in every state's population would result in a proportional or absolute loss of federal funds going to

Alabama." (Doc. 45-1, p.10). To the extent that statement is a factual assertion (and assumption) that Alabama's claimed injury lacks statistical support, it is premature. And to the extent Defendants are suggesting that Plaintiffs needed to plead detailed calculations of harm, Defendants are mistaken. It is enough that Plaintiffs have pleaded a cognizable harm; they need not also establish the exact amount of their damages before being allowed to prove that the harm will occur. *See Twombly*, 550 U.S. at 555 ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" not "detailed factual allegations.").

The Martinez Intervenors make the related argument that because some of the federal programs listed in Plaintiffs' complaint are allocated based on subsets of a state's population (e.g., children under 13), Plaintiffs must allege not only that Alabama's share of the total population will fall under Defendants' proposed census count, but also that Alabama's share of that population subset will fall. (*See* Doc. 60, p. 8). That argument fails for at least two reasons. As an initial matter, the argument "jumps ahead to a later stage of this case, ignoring the motion-to-dismiss standard," for courts "do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Renfroe v. Nationstar Mortg., LLC*, 822 F.3d 1241, 1247 (11th Cir. 2016). More fundamentally, two of the three federal programs provided as examples in Plaintiffs' complaint involve federal funds that are disbursed based on *total population*. *See* Doc. 1, ¶¶ 75-78; *see also* 49 U.S.C. § 5340(c)(1) (apportioning funds "based on the population trend for each State between the most recent decennial census and the most recent estimate of population made by the Secretary of Commerce"); *id.* § 5307 (making funds available based on population as determined by census); 23 U.S.C. § 104 (requiring Secretary of Transportation to use census to determine population for purposes of apportionment of funds).

Finally, Defendants in passing contend that any financial harm to Alabama is not "within the zone of interests protected by the Constitution's Census Clause" because the clause was "not intended … to provide funding to state or local projects." (Doc. 45-1, p. 11). This argument, of course, does not apply to harms Plaintiffs would suffer if Defendants cause Alabama to lose representation in Congress and the Electoral College. The argument is likewise inapplicable to any aspect of Plaintiffs' APA challenge.

And the argument fails even under the Census Clause as to Plaintiffs' financial harm. As an initial matter, to the extent Defendants would have the Court deem Plaintiffs' "claims nonjusticiable 'on grounds that are "prudential," rather than constitutional,' '[t]hat request is in some tension with [the Supreme Court's] recent reaffirmation of the principle that "a federal court's obligation to hear and decide" cases within its jurisdiction "is virtually unflagging."'" *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). In any event, the census was designed to apportion not only "[r]epresentatives," but also "direct Taxes." Const. art. I, § 2, cl. 3. Because the census was intended to help apportion financial burdens among the states, the Court should also hear this challenge regarding the apportionment of financial benefits.

II. Plaintiffs' Alleged Harms Are Likely To Be Redressed By Plaintiffs' Requested Relief.

Binding precedent from the Supreme Court and the Eleventh Circuit make clear that Plaintiffs' claimed representational harm is likely to be redressed by Plaintiffs' requested relief. Plaintiffs have plausibly alleged that if illegal aliens are included in the 2020 census count, Alabama's share of the National population will fall far enough that the State will lose one congressional representative, whereas if illegal aliens are not included, the State will retain its

current number of representatives. And if this Court declares that the Constitution and/or the APA requires Defendants to exclude illegal aliens from the census count, the Court could issue "a declaration leading, or an injunction requiring, the Secretary to" issue a report to the President that does not include illegal aliens in the census count. *Utah*, 536 U.S. at 463. If that report's "conclusion about the relative population[]" of Alabama allowed the State to maintain the congressional seat it would otherwise lose, "the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post-20[20] census congressional election." *Id.* And "[u]nder these circumstances, it would seem, as in *Franklin*," and as in *Utah*, "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision…." *Id.* at 463-64 (quoting *Franklin*, 505 U.S. at 803 (opinion of O'Connor, J.)). Plaintiffs' claims therefore are redressable.

The Martinez Intervenors have offered no persuasive argument to the contrary. (*See* Doc. 60, pp. 3-7). Instead, they introduce a new test for redressability. According to the Martinez Intervenors, Plaintiffs must show not only that it is "likely … that the injury will be redressed by a favorable decision," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but also that it is impossible for other non-parties (or at least for Congress or the President) to "thwart any redress ordered" by a court. (Doc. 60, p. 7). The Martinez Intervenors, however, do not cite a single authority for their new "thwartability" test.

There are, however, multiple decisions from the Supreme Court that foreclose Intervenors' argument. Indeed, both *Utah* and *Franklin* recognized plaintiffs' standing to sue the very Defendants named in this lawsuit to obtain relief based on purportedly unlawful census counts. The Martinez Intervenors badly misconstrue these decisions to support their novel theory of

redressability. For example, they assert that *Franklin* is distinguishable from this case because the *Franklin* plaintiffs sought only "to prevent the creation of alternative, adjusted Census data sets where the adjustments would injure the plaintiffs' interests." (Doc. 60, p. 4). That is flat wrong. In *Franklin*, the Census Bureau and Secretary had created one data set that included overseas military personnel in the census count. 505 U.S. at 793-94. Plaintiffs sought an order that would force defendants to create an additional data set by "eliminat[ing] the overseas federal employees from the apportionment counts." *Id.* at 791. Thus, far from seeking to "prevent[] the creation or use of an alternative data set," (Doc. 60, p.5), the plaintiffs sought to *mandate* the creation of a new data set. And though the Court ultimately ruled against plaintiffs on the merits, the Court did hold that plaintiffs had standing to bring their claim. *See id.* at 802-03 (plurality op.); *id.* at 807 (Stevens, J., concurring in part and concurring in the judgment).

The Court reached the same result in *Utah v. Evans*, in which the Census Bureau, Commerce Department, and related officials were sued for compiling a certain data set using estimates that "increased the final year 2000 count by about 1.2 million people." 536 U.S. at 458-59. Plaintiffs argued that those people should not be included in the count and "sought an injunction ordering the Secretary of Commerce to recalculate the numbers and recertify the official result." *Id.* at 460-61. And the Court held that because an order requiring the Secretary to report corrected census numbers to the President "would likely lead to a new, more favorable, apportionment of Representatives," the plaintiffs had standing. *Id.* at 461. The Court "would have ordered a change in a legal status (that of the 'report'), and the practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Id.* at 464. Utah thus had standing, even though it was only "substantially likely"—not certain—"that the President and other executive and

congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision." *Id.* (quoting *Franklin*, 505 U.S. at 803 (opinion of O'Connor, J.)).

Thus, the Martinez Intervenors are wrong on both the facts and the law when they assert that relief for the *Franklin* or *Utah* plaintiffs would have had "the practical effect of making it difficult or even impossible for any other policymaker to use the challenged adjusted data set …." (Doc. 60, p. 5). The challenged data sets already existed, and if plaintiffs prevailed, "two data sets would be available." (*Id.* at 6). The prospect that the President might flout the Court's order and "choose to use the unadjusted total population data, rather than the adjusted data preferred by Plaintiffs" (*id.* at 7) was not enough to deprive the plaintiffs of standing in *Franklin* or *Utah*, nor is it enough here.

Moreover, while the majority opinion in *Utah* settled *Franklin*'s redressability debate by siding with Justice O'Connor's view over that of Justice Scalia, *see Utah*, 536 U.S. at 459-64, the Eleventh Circuit—one year before *Utah*—also expressly adopted Justice O'Connor's position. In *Made in the USA Foundation v. United States*, the Eleventh Circuit held that a "partial remedy would be sufficient for redressability, in spite of the fact that 'the President has the power, if he so chose, to undercut this relief.'" 242 F.3d 1300, 1310 (11th Cir. 2001) (quoting *Swan v. Clinton*, 100 F.3d 973, 980-81 (D.C. Cir. 1996)). Thus, despite the President's potential authority to thwart relief ordered by the court, "a judicial order instructing subordinate executive officials to" take certain actions "would suffice for standing purposes." *Id.* at 1311.

These holdings foreclose the Martinez Intervenors' argument as to the President as well as their more novel argument that hypothetical Congressional action deprives Article III courts of jurisdiction. Intervenors speculate that Congress might later change the process for reapportionment or alter how federal funding is allocated among the states. (Doc. 60 at 6-7). But

when an Article III court otherwise has jurisdiction and the ability to issue an order that is likely to redress a plaintiff's injury, it does not lose that ability (or duty) to act merely because Congress might possibly later pass legislation that "thwarts" the plaintiff's goals. Federal courts, for example, adjudicate disputes over eligibility for various forms of federal aid, even though Congress has the power to modify or even abolish those programs. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970).

The Martinez Defendants also assert that redressability is unlikely because the President or Congress could later be sued and ordered to include illegal aliens in the census count. (Doc. 60, p. 6-7). But that speculation is not enough to deprive this Court of jurisdiction, just as it was not enough in *Franklin* or *Utah*. Moreover, it is doubtful that a court could order the President or Congress to take any action regarding the census count. *See Franklin*, 505 U.S. at 802-03 (O'Connor, J.) (noting that "in general this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties") (quotations omitted); *id.* (Scalia, J.) (arguing that "the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary"). And the Clerk of the House's duties are purely ministerial and compelled by the text of 2 U.S.C. § 2a(b), making it unlikely, if not impossible, that he could be forced to take actions exceeding his statutory powers.

Finally, the Martinez Intervenors raise the curious argument that Plaintiffs' requested remedies would not relieve Alabama's financial injury because "all of the pleaded requests relate solely to the injuries they assert with respect to reapportionment." (Doc. 60, p. 7). But any relief that increases Alabama's proportion of the National population for purposes of apportionment will likewise increase Alabama's share of federal funds and redress Alabama's financial harm.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of January, 2019, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to all counsel of record electronically registered with the Clerk.

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