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

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

Plaintiffs,

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, CALIFONRIA,

Defendant-Intervenors.

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

MARTINEZ DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF SUPPLEMENTAL MEMORANDUM

I. Plaintiffs Cannot Demonstrate Redressability With Current Named Defendants.

Having implicitly conceded that they are not seeking at this late point to change the actual collection of Census data in 2020, Plaintiffs fail to demonstrate redressability, with the current named defendants, as they seek to change how raw Census data is adjusted and presented for use. They present this case in the context of collected Census 2020 raw, unadjusted data that will include and not distinguish undocumented immigrants from other household members. This context presents insurmountable obstacles to Plaintiffs in demonstrating the requirements of standing with the current named defendants.

First, seeking to obscure the obvious obstacle to redressability presented by independent decision-makers who would be totally unbound by any decision in this litigation, Plaintiffs invent a label and blithely assert that the Martinez Defendant-Intervenors have invented a new "thwartability" test. *See* Opp. Br. at 16. Yet, it is difficult to imagine any complete definition of the redressability requirement for standing that does not take account of unnamed independent decision-makers who can frustrate a Plaintiffs' effective remedy. While the redressability requirement surely encompasses the naming of defendants who have no actual authority – perhaps naming one member of a deliberative body that may act only by majority vote – failing to name those with independent and equal or superior authority also means that a plaintiff cannot show that a favorable decision against the named defendants will likely redress a claimed injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Redressability is prevented both by naming the wrong defendants and by not naming enough defendants.

Second, by offering their own obfuscatory renditions of the facts in prior cases, Plaintiffs seek to rely on distinguishable previous decisions. Plaintiffs never address the difference between seeking to revert to unadjusted, raw enumeration data – as plaintiffs with standing in the

past have done – and seeking to mandate the creation and reporting of adjusted data as Plaintiffs seek to do here. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), plaintiffs did not seek the creation of a new form of adjusted data; they sought a reversion to the raw data as collected. *See id*. at 790-91. The unadjusted, raw enumeration data would have had overseas personnel categorized as living where they reported in their Census forms – a range of overseas locations. *Id*. Indeed, this unadjusted data, with overseas employees not reallocated from their reported overseas residences, was what the Census Bureau used in the previous Census in 1980. *Id.* at 793 ("the Bureau did not allocate overseas employees to particular States in the 1980 census"). With the 1990 Census, the Bureau sought to adjust the raw enumeration data by using separately reported domestic home addresses to reallocate overseas employees to specific states. *Id*. at 790-91, 795. The plaintiffs in *Franklin* sought to prevent this – to secure the use of unadjusted, raw enumeration data. *Id*. at 791, 795.

Similarly, in *Utah v. Evans*, 536 U.S. 452 (2002), the plaintiffs sought to prevent the use of Census data adjusted through the use of "hot-deck imputation." *Id*. at 459. Such imputation resulted in a significant change from actual, collected raw enumeration data. *See id*. at 458. Like the plaintiffs in *Franklin*, these plaintiffs thus also sought to prevent the use of adjusted data, not to mandate the creation of a new form of adjusted data. Plaintiffs here place too much emphasis on the fact that the Census Bureau had already decided to use adjusted data – through reallocation of overseas personnel or through hot-deck imputation of data – in these two previous cases. That seems of little consequence in the standing inquiry; indeed, there would seem no need for any court litigation unless the Bureau has already made a challengeable decision to use adjusted data. Even once adjusted data is created, an injunction preventing its use would bar the Bureau from supporting – by explanation, review of proffered potential errors, or further

adjustment – the adjusted data set. The nature of unadjusted, raw enumeration data is that it requires little further support once obtained.

It would not at all be unusual for federal courts to recognize – even with respect to standing – a distinction between seeking the use of unadjusted Census data and seeking the creation of a new form of adjusted Census data. In this case, the creation of a new set of adjusted data could easily be ignored by either the congressional or executive decision-makers who are allocated a specific and necessary role in the apportionment process; either could choose to use the readily available unadjusted, raw enumeration data actually collected from households in Census 2020. That is enough to frustrate the Plaintiffs' remedy even if they prevail against the named defendants. Plaintiffs cannot establish all of the requisites of standing without naming those intervening independent decision-makers who could prevent or thwart redress.

II. Plaintiffs Do Not Establish Standing for a Financial Injury.

Plaintiffs have failed to adequately allege a financial injury. Plaintiffs' defense on this issue relies heavily upon the early stage of this litigation; however, even at the pleading stage, plaintiffs may not rely upon a mere conclusory allegation of financial injury. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions").

Plaintiffs have failed to allege that the specific Census data subsets involved in allocating specific federal funding would, if the undocumented population is included, change the distribution of funding to Alabama's detriment. Plaintiffs seem to believe that their detailed allegations of change with respect to total population as used for apportionment would automatically dictate a sufficient change in any other Census data subset as to harm Alabama's receipt of federal funding. That assumption is not so clear and automatic as to preclude the

necessity of alleging the specific change. For example, just because total population used for apportionment may change sufficiently due to the inclusion of the undocumented residents as to injure Alabama, that does not mean that the calculation of the projected population 15 years in the future would be so changed by the inclusion of undocumented persons in today's count as to adversely affect Alabama's receipt of transportation funding under 49 U.S.C. § 5340(c), one of the statutes cited in the Complaint. *See* Complaint ¶ 77.[1] The use of Census data in funding formulae is far too differentiated and complicated for general allegations as to the total population measure used for apportionment to suffice to demonstrate standing, even at the pleading stage.

The inadequacy of Plaintiffs' demonstration of standing to pursue a financial injury, even at the pleading stage, also appears in the Complaint's prayer for relief. Knowing that there is in fact no relief requested as to the asserted financial injury, Plaintiffs facilely assert that "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." Opp. Br. at 19. First, as explained above, federal statutes' use of different Census data sets than the apportionment data set makes that response nonsensical. Indeed, even if total population were used to allocate funding, nothing in the Constitution requires that the adjusted total population data Plaintiffs seek to require for apportionment would also automatically be used for allocation of funding. Apportionment of representation in the House of Representatives and allocation of federal funding (in a multitude of subject areas) serve different purposes. Therefore, even Plaintiffs' description of the declaration it seeks – because it is explicitly

[1] Further epitomizing the inadequacy of Plaintiffs' allegations as to financial injury, the Complaint references "Urbanized Area Formula Funding," but the cited statute seems to use an urban population measure for purposes of allocation within a state, not between states. *See* 49 U.S.C. § 5340(c)(2). Even were allocation within a state properly at issue in this case, Plaintiffs would have to allege that undocumented immigrants reside sufficiently more in urban or non-urban areas as to skew the urbanized population estimate one way or the other.

grounded in sources of law tied to apportionment concerns – would not necessarily provide any relief for the asserted federal funding loss. Having failed to seek any relief for their asserted financial harm, Plaintiffs cannot establish standing for a financial injury, even at the pleading stage of litigation.

Dated: February 1, 2019

Respectfully submitted,
/s/ Edward Still

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I filed the Martinez Defendant-Intervenors' Reply in Support of Supplemental Memorandum with the Court's CM/ECF Filing System, which will send a Notice of Electronic Filing to all parties of record who are registered with CM/ECF. On February 1, 2019, I mailed by United States Postal Service the document to the following non-CM/ECF participant:

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