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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

STATE OF ALABAMA, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF COMMERCE; et al., *Defendants*, and DIANA MARTINEZ, et. al.; COUNTY OF SANTA CLARA, CALIFORNIA, et al.; and STATE OF NEW YORK, et al., *Defendant-Intervenors*.	Civil Action No. 2:18-cv-00772-RDP

RESPONSE FROM PLAINTIFFS TO THE COURT'S JANUARY 8, 2021 SHOW CAUSE ORDER

Plaintiffs respectfully submit the following response to the Court's January 8, 2021 Show Cause Order, which directed Plaintiffs to show cause "why the injuries they allege are more than just 'predictions.'" (Doc. 195 at 3) (quoting *Trump v. New York*, 141 S.Ct. 531, 536 (2020)). Pursuant to the Court's January 29 Text Order, Plaintiffs also address the implications of President Biden's Executive Order from January 20, 2021, entitled "Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census," (Doc. 200-1) (the "Biden Executive Order," or "Order"), "particularly as [the Order] relates to the question of whether a ruling on the propriety of the Census Bureau's Residence Rule would redress (*i.e.*, cure) the injury claimed by Plaintiffs," (Doc. 203).

While "[p]re-apportionment litigation always 'presents a moving target,'" *Trump v. New York*, 141 S.Ct. at 535, that target significantly steadied in the weeks following this Court's show-

cause order. Most significantly, on his first day in office, President Biden issued the Biden Executive Order, which declared "it is the policy of the United States that reapportionment shall be based on the total number of persons residing in the several States, without regard for immigration status," Order § 2; provided "the Secretary shall use tabulations of population . . . without regard to immigration status," *id.* § 3; and revoked President Trump's July 21, 2020 Presidential Memorandum, *see id.* § 5.

These actions make clear that President Trump's Presidential Memorandum will not be implemented. Accordingly, the "contingencies and speculation" that doomed the plaintiffs in *Trump v. New York* are not present here. The hedged and contingent Memorandum that impeded judicial review in that case has been replaced with President Biden's unequivocal order to count illegal aliens for purposes of apportionment. The facts here therefore are simple, and their consequences predictable: Defendants will implement the Residence Rule[1] by including illegal aliens in the apportionment count reported to the President, and this action will place Alabama at substantial risk of losing political representation.

Moreover, the justiciability analysis in *Trump v. New York* does not apply to this case. Because the plaintiffs in *Trump v. New York* challenged "the apportionment process" and because that process was "at a preliminary stage," the plaintiffs' claims relied on an impermissible degree of speculation. 141 S.Ct. at 536. Plaintiffs there challenged potential action that faced "both legal and practical constraints, making any prediction about future injury just that—a prediction." *Id.* But as this Court previously noted, Plaintiffs here challenge "a practice that might affect a future

[1] Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (February 8, 2018).

division of districts." (Doc. 178 at 5). In other words, Plaintiffs challenge a "census operation . . . that will predictably change the count," not "the apportionment process" itself. *New York v. Trump*, 141 S.Ct. at 536. And that census operation is final. Thus, rather than *Trump v. New York*, this case is controlled by multiple Supreme Court decisions recognizing the viability of pre-apportionment challenges to census operations. *See, e.g.*, *Dep't of Com. v. New York*, 139 S.Ct. 2551 (2019); *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316 (1999).

By counting illegal aliens for purposes of reapportionment, Defendants threaten to deprive Alabama of political representation. This is precisely the sort of pre-apportionment challenge the Supreme Court has held justiciable. *See U.S. House*, 525 U.S. at 331–32. Because further delay may "result in extreme—possibly irremediable—hardship" to Plaintiffs, *id.* at 333, this Court should reaffirm this case's justiciability, permit prompt and targeted discovery, and then resolve this case.

I. This case is unlike *Trump v. New York*.

In *Trump v. New York*, the Supreme Court held plaintiffs' claims suffered fatal standing and ripeness defects, and were therefore non-justiciable under Article III. 141 S.Ct. at 535. Articulating the relevant framework, the Court explained that "[f]irst, a plaintiff must demonstrate standing, including an injury that is concrete, particularized, and imminent rather than conjectural or hypothetical. Second, the case must be 'ripe'—not dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id*. After addressing the various contingencies attendant to plaintiffs' claims, the Court concluded, "[a]t the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature." *Id.* at 536. This case suffers none of the same defects.

A. Unlike the plaintiffs in *Trump v. New York*, Plaintiffs do not challenge "the apportionment process."

The *Trump v. New York* Court acknowledged that courts may hear pre-apportionment challenges to census operations. 141 S.Ct. at 536. Indeed, the Supreme Court entertained just such a challenge recently. *See Dep't of Com. v. New York*, 139 S.Ct. at 2565–66. In holding it lacked Article III standing in *Trump v. New York*, the Supreme Court distinguished pre-apportionment challenges to "the apportionment process" from pre-apportionment challenges to "census operations . . . that will predictably change the count." 141 S.Ct. at 536 (placing *Dep't of Com. v. New York* and *U.S. House* in the latter category). Concluding the *Trump v. New York* plaintiffs were challenging "the apportionment process" and that the process was still in a "preliminary stage," the Court reasoned that "any prediction about future injury [was] just that—a prediction," and thus insufficient to show standing. *Id.*

The Court's distinction is relevant here. The *Trump v. New York* plaintiffs filed suit to enjoin the method by which President Trump would have effected his policy. *Id.* at 535. That method was necessarily a "process" of "apportionment," distinct from "census operations . . . that will predictably change the count." *Id.* at 536. Though a challenge to the "apportionment process" might not categorically involve greater speculation than a challenge to "census operations," the former requires evidence of harm attributable to a process of apportionment separate from "the count." Showing such a "process" exists is, of course, a necessary precondition to showing the process will likely harm plaintiffs. But the *Trump v. New York* plaintiffs were unable to show the "apportionment process" they challenged would even occur. *Id.* at 535 ("We simply do not know whether and to what extent the President might direct the Secretary to 'reform

the census' to implement his general policy with respect to apportionment."). The Court thus held the plaintiffs could not show facts sufficient to confer Article III standing. *Id.* at 536.

Plaintiffs here allege that Defendants' inclusion of illegal aliens in the apportionment count is unlawful and unconstitutional. Inclusion of specific figures in the census count necessarily implicates a "census operation" affecting "the count." Moreover, this Court's denial of Plaintiffs' motion for a three-judge court concluded that Plaintiffs do not challenge "the actual division of congressional districts"—in other words, apportionment—but instead "a practice that might affect a future division of districts." (Doc. 178 at 5). That holding controls. *See, e.g.*, *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 n.3 (11th Cir. 1990) (law-of-the-case doctrine "require[s] a court to follow what has been decided explicitly, as well as by necessary *implication*, in an earlier proceeding") (emphasis in original). Thus, Plaintiffs' challenge is exactly the kind over which the Supreme Court reaffirmed justiciability in *Trump v. New York*. 141 S.Ct. at 536.

Because Plaintiffs do not challenge "the apportionment process," the justiciability hurdles from *Trump v. New York* are inapposite. This Court should instead look to cases in which plaintiffs challenged pre-apportionment "census operations" likely to alter the count. *See U.S. House*, 525 U.S. at 331–332; *Dep't of Com. v. New York*, 139 S.Ct. at 2565–66. As discussed below, Plaintiffs handily satisfy the standing requirements set out in analogous pre-apportionment cases.

II. Plaintiffs meet each of Article III's standing requirements.

The Supreme Court has "repeatedly noted that in order to establish Article III standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *U.S. House*, 525 U.S. at 329 (cleaned up). Plaintiffs allege "primarily future injuries, which 'may suffice if the threatened injury is certainly

impending, or there is a substantial risk that the harm will occur.'" *Dep't of Com. v. New York*, 139 S.Ct. at 2565 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

In *U.S. House*, the Supreme Court "conclude[d] that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment." 525 U.S. at 343. The Court "beg[an] [its] analysis with the threshold issue of justiciability," asking specifically "whether [plaintiffs] satisfy the requirements of Article III standing." *Id.* at 329. At the summary-judgment stage, the *U.S. House* plaintiffs had submitted expert affidavits showing with "virtual certainty that Indiana [would] lose a seat . . . under the Department's Plan." *Id.* at 330 (internal quotation marks omitted). Noting the parties did not dispute the affidavits' conclusions, the Court held "[plaintiff's] expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Id.* at 331. Indeed, "the threat of vote dilution" through a constitutionally impermissible method of counting, the Court reasoned, "is concrete and actual or imminent, not conjectural or hypothetical." *Id.* at 332 (cleaned up).

The Supreme Court expanded this logic in *Department of Commerce v. New York*. 139 S.Ct. 2551. There, plaintiffs introduced evidence showing "a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which would cause them to be undercounted and lead to many of the injuries respondents asserted." *Id.* at 2566. Taking the proposed government action for granted, Plaintiffs' theory of harm thus relied on a prediction about how "noncitizen households" would respond to the government action. The Court concluded that plaintiffs' theory of standing exceeded "mere speculation" and relied only on "the predictable effect of Government action on the decisions of third parties." 139 S.Ct. at 2566.

Plaintiffs' theory of standing is just like that in *U.S. House*, and, requiring no speculation about third-party actions, involves significantly less prediction than the theory of standing successfully alleged in *Department of Commerce v. New York*. As in *U.S. House*, the Department of Commerce is engaging in a method of counting constitutionally impermissible for purposes of political apportionment—here, counting illegal aliens; there, counting via statistical sampling, 525 U.S. at 320. And again as in *U.S. House*, Plaintiffs have shown that they are substantially likely to suffer injury from this constitutionally impermissible method of counting; that the injury is traceable to Census's inclusion of illegal aliens for apportionment purposes; and that this Court can redress Plaintiffs' injury by declaring Census's counting method unconstitutional. This Court should hold, just as in *U.S. House*, that Plaintiffs have standing under Article III.

A. Plaintiffs can show a "substantial likelihood" of harm.

The facts relevant to proving Plaintiffs' harm require no "guesswork." *Trump v. New York*, 141 S.Ct. at 536. All parties agree illegal aliens comprise a disproportionately small share of Alabama's population relative to other states in this litigation. Indeed, Defendant-Intervenors justified their intervention in this case on those very grounds, arguing "[p]laintiffs' complaint explicitly seeks the redistribution of funds to Alabama and away from states and localities with a *higher relative share of the undocumented immigrant population*, like the Movants here." (Doc. 97 at 12) (emphasis added); *see also* (Doc. 9 at 13) (Defendant-Intervenors stating they are "home to many foreign-born residents, including undocumented persons").

So it is not surprising that counting illegal aliens for reapportionment harms Plaintiffs. Based on the most up-to-date figures available from the Census Bureau, when political reapportionment includes illegal aliens Alabama "ends up with 6 seats, and ends up ranked in 436th place to receive its 7th seat." *See* Poston Report, Ex. A at 3. In other words, Alabama

misses out on a Congressional seat by a closer margin than any other State in the Union. This conclusion lines up with the one found in an export report submitted by Defendant-Intervenor New York in *Trump v. New York*, which showed that Alabama was likely to keep its seven House seats when reapportionment excluded illegal aliens, but would keep only six when illegal aliens were included. *See* Warshaw Decl., Ex. B at 23 (Table 7).

What is more, the States holding disproportionately more illegal aliens than Alabama are the very states threatening Alabama's representation. New York, for example, has the fourth-highest population of illegal aliens of any State in the country, *see* Ex. B at 20 (Table 6), and is currently neck-and-neck with Alabama for the 435th and final Congressional seat, *see* Electronic Data Services Report, Ex. C at 1–2. Removing illegal aliens from the apportionment count will thus diminish New York's representation and likely eliminate the substantial risk of harm to Plaintiffs. *See* Ex. A § II (showing Alabama likely to keep seventh seat when even small fraction of illegal aliens removed from count); Ex B at 23 (Table 7). As New York acknowledges, "reapportionment of House seats and electoral votes is a zero-sum proposition: Each state's gain is another state's loss," (Doc. 97 at 9) (quoting Doc. 1 at 11); if Defendants did not plan to include illegal aliens in reapportionment figures, Plaintiffs would not face a substantial risk of losing political representation to New York. *See* Ex. A § I; Ex. B at 23 (Table 7); Ex C at 2 ("[T]he Alabama seat would shift to the state of New York.").

In sum, Defendants' inclusion of illegal aliens in the apportionment base is substantially likely to cost Alabama a seat in the House of Representatives. Alabama's "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing." *U.S. House*, 525 U.S. at 331.

B. This harm traces directly to illegal aliens' unconstitutional inclusion in the reapportionment count, and this Court can redress that harm by declaring such a count unconstitutional.

After concluding plaintiffs had "undoubtedly satisfie[d] the injury-in-fact requirement," the *U.S. House* Court made quick work of Article III's next two inquiries: "There is undoubtedly a 'traceable' connection between the use of sampling in the decennial census and Indiana's expected loss of a Representative, and there is a substantial likelihood that the requested relief—a permanent injunction against the proposed uses of sampling in the census—will redress the alleged injury." 525 U.S. at 331–32. That logic applies with equal force here, and this Court should hold the same.

First, as in *U.S. House*, the harm to Plaintiffs flows directly from the government's method of counting: the Residence Rule and the Biden Executive Order require Defendants to include illegal aliens in the apportionment base, *see* Biden Executive Order § 2; counting illegal aliens for purposes of apportionment disproportionately increases political representation in certain states—including New York, which threatens to claim the final House seat from Alabama—and correspondingly diminishes Alabama's political representation, *see* Ex. A § I; and this diminution in Alabama's political representation "undoubtedly satisfies the injury-in-fact requirement for standing," *U.S. House*, 525 U.S. at 331. The State's proffered evidence mirrors non-partisan organizations' uncontroversial conclusion that Alabama would not lose congressional representation in 2020 were it not for illegal aliens' inclusion in the Census Bureau's apportionment figures. *See, e.g.*, Jeffrey S. Passel & D'Vera Cohn, *How Removing Unauthorized Immigrants from Census Statistics Could Affect House Reapportionment*, Pew Research Center (July 24, 2020), https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/. Nothing more is required.

Dep't of Com. v. New York, 139 S. Ct. at 2566 ("Article III 'requires no more than *de facto* causality.'") (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)).

And second, "there is a substantial likelihood that the requested relief"—here, declaring Census's inclusion of illegal aliens for reapportionment unconstitutional—"will redress the alleged injury." *U.S. House*, 525 U.S. at 331–32. The Biden Executive Order requires that the Secretary "take all necessary steps, consistent with law, to ensure that the total population information presented to the President and to the States is accurate and *complies with all applicable laws*." Order § 2 (emphasis added). And undoubtedly "the Secretary may make . . . changes to the census up until the President transmits his statement to the house." *Trump v. New York*, 1441 S.Ct. at 535 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 797–98 (1992)).

So if this Court holds Defendants may not count illegal aliens for apportionment purposes, they must correct the "serious mistake" in their calculation. *Utah v. Evans*, 536 U.S. 452, 462 (2002). This Court could, for example, issue "a declaration leading, or an injunction requiring, the Secretary to" submit a report to the President that does not include illegal aliens in the census count. *Id.* 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 v. Evans*—"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). That this Court may not declare injunctive relief against the President is no matter; "the injury alleged is likely to be redressed by declaratory relief against the Secretary

alone." *Franklin*, 505 U.S. at 803; *see also Made in the USA Foundation v. United States*, 242 F.3d 1300, 1310 (11th Cir. 2001) (holding "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'") (quoting *Swan v. Clinton*, 100 F.3d 973, 980–81 (D.C. Cir. 1996)).

Furthermore, Defendants need not remove every illegal alien from the apportionment count to keep Alabama from losing representation, so any ambiguity over the quantum of relief this Court's order may ultimately afford Plaintiffs is beside the point. As Exhibit A illustrates, Alabama is substantially likely to retain its seventh congressional seat even if Defendants are able to remove only a fraction of illegal aliens from the apportionment count. *See* Ex. A § II. Indeed, if Defendants can lawfully remove just one out of every ten illegal aliens from the apportionment count, Alabama is substantially likely to retain its seventh seat. *Id.* § II.4. And any uncertainty over Defendants' capacity to constitutionally remove illegal aliens from the apportionment base only underscores the need for targeted, efficient discovery, which this Court should allow as soon as possible.

The Biden Executive Order unequivocally requires inclusion of illegal aliens for apportionment purposes, Order §§ 2–3, and thus removes whatever doubt remained about Plaintiffs' standing. The President's policy requires nothing more than accepting the apportionment number Defendants are actively trying to produce, mooting any dispute over the policy's implementation. As described above and shown in the attached exhibits, counting illegal aliens disproportionately benefits other States to Alabama's detriment and is substantially likely to cost Alabama its seventh seat in the House of Representatives. *See* Ex. A § I. Plaintiffs have standing to prosecute their claim.

III. This case is ripe for resolution.

The ripeness issues that precluded justiciability in *Trump v. New York* do not apply here. The Biden Executive Order ensures that a policy detrimental to Alabama—counting illegal aliens for purposes of political reapportionment—will occur. No "guesswork" is required. *Trump*, 141 S.Ct. at 536.

To ensure a case is ripe for resolution, a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296, 301 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). A case is "ripe" when it does "not depend[] on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 141 S.Ct. at 535 (quoting *Texas*, 523 U.S. at 300); *see also* 13B Charles A. Wright et al., *Federal Practice & Procedure* § 3532.1 (3d ed. Oct. 2020 Update) ("[R]ipeness . . . asks whether the injury is too contingent or remote to support present adjudication.").

In *Trump v. New York*, the plaintiffs' claim required them to show a likelihood of several distinct contingencies: what policy the President would actually implement (the text of the Presidential Memorandum notwithstanding); how the President would implement whatever policy he chose; and why implementation of the chosen policy would harm the plaintiffs. The plaintiffs were unable to show with any degree of certainty—let alone a substantial one—either what policy the President would implement or how he would implement it, which foreclosed in equal measure their ability to show why the policy was "substantially likely to harm" them. 141 S.Ct. at 535 ("Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time."); *see also id.* at 535–36 (record "silent" on data integral to implementation of policy; unclear "whether and to what extent" President would

implement policy; "[n]othing in the record addresses the consequences of partial implementation"). Because the plaintiffs could not show any of the alleged harm's logical prerequisites, speculating over potential damages involved an impermissible "degree of guesswork." *Id.* at 536.

But the "contingencies and speculation that impede[d] judicial review" in *Trump v. New York* no longer apply. *Id.* at 535. Because the count that Defendants will present to President Biden is the very count the President will use for political reapportionment, the President's policy requires no intervening steps. Indeed, the Biden Executive Order leaves no room for speculation over "whether and to what extent" President Biden will "implement" his policy, *Trump v. New York*, 141 S.Ct. at 535—the President has simply revoked the Presidential Memorandum and declared that Defendants will count illegal aliens for purposes of apportionment and funding, Order §§ 2–3.

Whether and how Census will "implement" this policy involves no "guesswork" whatsoever—let alone a "significant degree" of it, *id.* at 536. This case is ripe for resolution.

February 4, 2021

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CERTIFICATE OF COUNSEL

I certify, as an officer of the Court, that I have affirmatively and diligently sought to submit to the Court only those documents, factual allegations, and arguments that are material to the issues to be resolved in the motion, that careful consideration has been given to the contents of Plaintiffs' submission to ensure that it does not include vague language or an overly broad citation of evidence or misstatements of the law, and that the submission is non-frivolous in nature.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Edmund G. LaCour Jr.
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