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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. THE 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.*, *Intervenor-Defendants.*	Case No. 2:18–cv–00772–RDP

FEDERAL DEFENDANTS' REPLY TO
PLAINTIFFS' SHOW-CAUSE-ORDER RESPONSE

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INTRODUCTION

The Court should dismiss this action for lack of jurisdiction. As explained below, a straightforward application of *Trump v. New York*[1] demonstrates that Plaintiffs' supposed injuries relating to a hypothetical loss of a congressional seat due to the inclusion of undocumented immigrants in the apportionment base are not "certainly impending," nor is there a "substantial risk" of future harm. Plaintiffs' attempt to escape this conclusion are unavailing: The conclusions in the expert report that they submitted with their response to this Court's show-cause order are based on no fewer than seven speculative assumptions layered on top of four sources of estimates. That is no basis to support standing. For these same reasons, Plaintiffs' claims are not ripe—the Census Bureau has not yet provided the population figures that will be used for reapportionment, and will not do so until the end of April. Accordingly, the Court should dismiss this lawsuit for lack of jurisdiction or, at minimum, stay further proceedings until the Census Bureau provides apportionment data that will reveal whether Alabama is entitled to seven, or six, representatives—now a mere ten weeks away.

Even if this Court declines to dismiss this lawsuit, President Biden's recent Executive Order regarding the Census fundamentally changes the nature of the issues that the Court would need to resolve—to the extent they are amenable to resolution. While Plaintiffs have consistently styled this case as a challenge to the Census Bureau's Residence Rule, that Rule is, for all practical purposes, no longer relevant to the relief Plaintiffs are seeking. Executive Order 13,986, signed by President Biden on January 20, 2021, announced a policy "that reapportionment shall be based on the total number of persons residing in the several States, without regard for immigration status."[2] That Executive Order sets forth the position of the United States Government regarding the appropriate base population to

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[1] 141 S. Ct. 530 (2020) (per curiam) ("*New York*").

[2] Ensuring a Lawful & Accurate Enumeration & Apportionment Pursuant to the Decennial Census, Exec. Order No. 13,986 § 2, 86 Fed. Reg. 7015, 7016 (Jan. 25, 2021).

be used for the apportionment. And because it was issued by the President, the Executive Order supersedes the Census Bureau's subordinate procedural criteria in the Residence Rule for determining where people reside. In other words, regardless of what the Residence Rule says—or whether the Court ultimately sustains or enjoins it—the presidential policy controls. Likely for this reason, Plaintiffs' Response barely mentions the Residence Rule. The Rule can no longer serve as an avenue for redress.

While Plaintiffs may still theoretically pursue redress for their supposed future injuries outside the context of the Residence Rule, doing so would present another justiciability issue: If this action morphs from a challenge to the Residence Rule into a challenge to the President's apportionment policy as expressed in the Executive Order, Plaintiffs would be "challenging the constitutionality of the apportionment of congressional districts," 28 U.S.C. § 2284(a), and this single-judge Court would be unable to provide Plaintiffs with *any* relief. Though this Court determined that the Residence Rule is a "'precursor[] to the ultimate apportionment,'" and thus not subject to a three-judge court, Mem. Op. & Order, Doc. 178 at 6, a challenge to the President's apportionment policy would constitute a direct challenge to the composition of the apportionment base, and is thus subject to a three-judge court. Of course, this Court need not and should not reach that issue in the first instance because it has the ability to dismiss Plaintiffs' claims, as currently framed, for lack of jurisdiction. But if this case goes forward—presumably only if Alabama actually loses a representative and can demonstrate that the loss is due to the inclusion of undocumented immigrants—then a three-judge court will be necessary.

ARGUMENT

I. *NEW YORK* DEMONSTRATES THAT THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THIS ACTION

The Supreme Court's recent decision in *New York* makes plain that Plaintiffs lack standing, and that their claims are not ripe. Plaintiffs' attempts to distinguish *New York* are unavailing.

Accordingly, the Court should dismiss this action for lack of jurisdiction. At a minimum, the Court should extend the existing stay until after the apportionment, which, as Plaintiffs recently put it, "could affect Plaintiffs' standing." Joint Mot. to Extend the Stay of Proceedings ("Joint Mot."), Doc. 193, at 4.

A. *New York* Demonstrates That This Court Lacks Jurisdiction

As the "part[ies] invoking federal jurisdiction," Plaintiffs "bear[] the burden of establishing standing." *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1228 (11th Cir. 2019). The Court's standing inquiry here is more rigorous than in most other cases, for two reasons. *First*, Plaintiffs "bear[] a more rigorous burden" than usual "to establish standing" because they "rest [their] claims for declaratory and injunctive relief on predicted *future* injury." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (emphasis added, citation omitted). *Second*, the Court's "standing inquiry" is also "especially rigorous" because "reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Plaintiffs have not satisfied their doubly rigorous burden here.

"[A] plaintiff alleging a threat of harm does not have Article III standing unless the hypothetical harm alleged is either 'certainly impending' or there is a 'substantial risk' of such harm." *Tsao v. Captiva MVP Rest. Partners, LLC*, -- F.3d --, 2021 WL 381948, at *5 (11th Cir. Feb. 4, 2021). Plaintiffs do not contend in their Response that their injury is "certainly impending." Nor could they: After all, Alabama might well retain seven House seats regardless of whether undocumented immigrants are included in the apportionment base. *See, e.g.*, Doc. 204–1 ("Poston Rep.") at 3 (opining that if all undocumented immigrants are included in the apportionment base, Alabama "ends up ranked in 436th place to receive its 7th seat," *i.e.*, just one place away from actually receiving a seventh seat); Paul Gattis, "Alabama may avoid losing seat in Congress, Census estimates suggest," *AL.com* (Dec. 23, 2020), https://www.al.com/news/2020/12/alabama-may-avoid-losing-seat-in-congress-

census-estimates-suggest.html ("Based on population estimates released Tuesday by the U.S. Census, it appears Alabama will narrowly avoid losing a seat in Congress."). Instead, Plaintiffs simply contend that "Defendants' inclusion of illegal aliens in the apportionment base is *substantially likely* to cost Alabama a seat in the House of Representatives." Response from Pls. to the Court's Show Cause Order ("Pls. Resp."), Doc. 204, at 8 (emphasis added).

Though there is no "numerical standard governing the quantum of risk that is sufficient to support standing," the Eleventh Circuit, sitting en banc, has made clear that the substantial-risk standard is "high," and cannot be satisfied by merely "conceivable" or "theoretical" risks. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 927–28 (11th Cir. 2020) (en banc). And as in *New York*, Plaintiffs' claimed injury—a "lost" House seat—though perhaps conceivable in nature, is "just . . . a prediction,"*see* 141 S. Ct. at 536, which does not clear the "high" substantial-risk hurdle necessary to demonstrate standing, *see Muransky*, 979 F.3d at 927.

New York explains that "[p]re-apportionment litigation *always* 'presents a moving target' because the Secretary may make (and the President may direct) changes to the census up until the President transmits his statement to the House." 141 S. Ct at 535 (emphasis added) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797–98 (1992)). And just like *New York*, this action is "riddled with contingencies and speculation that impede judicial review." *Id.* at 535. One need only glance at Plaintiffs' new expert report, *see generally* Poston Rep., to confirm as much.

Plaintiffs premise their standing theory on the notion that "Defendants' inclusion of illegal aliens in the apportionment base is substantially likely to cost Alabama a seat in the House of Representatives." Pls. Resp at 8. But Plaintiffs' expert, Dr. Poston, cannot definitively state that—even if all undocumented immigrants are included in the apportionment base—Alabama will lose a House seat. This is because the census apportionment base "must comply with the constitutional requirement of an 'actual Enumeration' of the persons in each State, as opposed to a conjectural

estimate." *New York*, 141 S. Ct. at 535. Lacking knowledge of the results of the "actual Enumeration," which are currently being processed by the Census Bureau and are subject to presidential review, Dr. Poston's opinions—that Alabama would receive six House seats if all undocumented immigrants are included in the apportionment base, but seven seats if even 10% of undocumented immigrants are excluded from the base—are necessarily based on "conjectural estimate[s]," subject to a host of "contingencies and speculation," and "involve[] a significant degree of guesswork." *New York*, 141 S. Ct. at 535–36.

Dr. Poston's initial opinion that Alabama would receive six House seats if all undocumented immigrants are included in the apportionment base is premised *entirely* on estimates of state populations as of July 1, 2019, and July 1, 2020. Poston Rep. at 3. And from these estimates, Dr. Poston layers on at least three unsubstantiated assumptions. *First*, Dr. Poston "assum[es] . . . that the Census Bureau's estimates of the states' July 1, 2019 and July 1, 2020 populations are their true counts in 2019 and 2020." Poston Rep. at 3; *but see New York*, 141 S. Ct. at 535 (census must be based on an "actual Enumeration," not estimates). *Second*, Dr. Poston "assum[es] . . . that the states will grow or decline in size between July 1, 2019 and April 1, 2020," *i.e.*, Census Day, "at the same rates as the estimated changes between July 1, 2019 and July 1, 2020," Poston Rep. at 3—a highly questionable assumption given the ongoing pandemic, which emerged in the late winter and early spring of 2020. And *finally*, Dr. Poston simply excludes from his calculations overseas military and government personnel and their dependents (even though those individuals were included in the most recent apportionments) primarily because Dr. Poston "do[es] not have overseas data for 2020 and for other years following 2010," *id.* at 4, a problematic omission since the overseas military population sufficed "to shift a Representative from Massachusetts to Washington" in the 1990 census. *Franklin*, 505 U.S. at 790–91.

Based on these two sources of estimates and three dicey assumptions, Dr. Poston purports to "apportion[] the House" and concludes that "Alabama ends up with 6 seats." Poston Rep. at 3. Nowhere does Dr. Poston make any effort to test or validate his assumptions, nor does he develop any sort of statistical margin of error between his *ad hoc* methodology and the forthcoming results of the actual enumeration.

Dr. Poston's rampant speculation does not end there. After all, even if Alabama would in fact "end[] up with 6 seats" based on an apportionment base that does not exclude undocumented immigrants, if the exclusion of undocumented immigrants would not alter that outcome, then Alabama cannot be said to be injured by the decision to include undocumented immigrants in the apportionment base. And excluding all undocumented immigrants, or even just a portion of them, would hardly be a trivial matter. Even if excluding this population were constitutionally required[3]—a proposition that is beyond the scope of topics on which this Court has sought briefing—any such exclusion "must comply with the constitutional requirement of an 'actual Enumeration.'" *New York*, 141 S. Ct. at 535. Because the Census Bureau did not inquire as to the legal status of census respondents in the 2020 census questionnaire, the ability to exclude undocumented immigrants from the apportionment base necessarily turns on "which (and how many) aliens have administrative records that would allow the Secretary to avoid impermissible estimation, and whether the Census Bureau can even match the records in its possession to census data." *Id.*

Dr. Poston speaks to none of these real-world issues. Instead, Dr. Poston simply took "estimates of the numbers of undocumented persons residing the 50 states" in 2018; "divided" those estimates "by the Census Bureau's estimates of the 2018 resident populations of the states, to obtain

[3] Executive Order 13,986 notes that it is the policy of the United States that the Fourteenth Amendment and 2 U.S.C. § 2(a) "require that the apportionment base of each State, for the purpose of the reapportionment of Representatives following the decennial census, include all persons whose usual place of residence was in that State as of the designated census date, regardless of their immigration status." 86 Fed. Reg. at 7016.

of the proportions of undocumented immigrants in the states in 2018"; and multiplied those estimated proportions by his estimates of the states' 2020 resident populations, which as explained above, were developed using two sources of estimates and three assumptions. Poston Rep. at 6. Based on these calculations—now based on *four* sources of estimates—Dr. Poston opines that if as little as 10% of the undocumented-immigrant population were excluded from the apportionment base, "Alabama ends up with 7 seats." *Id.* at 8.

But this opinion is subject to at least four more (unfounded) assumptions, both express and implied. *First*, Dr. Poston expressly "assumes that the proportions of undocumented immigrants in the states in 2018, based on the [estimated] data" on which he relies "will be the same proportions in 2020." *Id.* at 6. *Second*, Dr. Poston impliedly assumes that estimates of the undocumented population—a difficult population to count—resemble the *actual* number of undocumented immigrants in the United States that were counted in the 2020 Census. *Third*, Dr. Poston impliedly assumes that undocumented immigrants would be excluded at a uniform, undifferentiated rate across all 50 states. *Finally*, Dr. Poston impliedly assumes that even 10% of the undocumented population (i) actually responded to the census, *and* (ii) those responses could be matched to high-quality administrative records reflecting that they were without legal status on April 1, 2020, such that the Census Bureau could exclude those persons from the apportionment base in a manner that "avoid[s] impermissible estimation," *New York*, 141 S. Ct. at 535. Dr. Poston does not explain why he assumes that even 10% of the undocumented population could be excluded from the apportionment base in a manner that would comport with constitutional requirements. For all Dr. Poston knows, a more realistic rate might be 5%, or 1%, or 0.1%—and Dr. Poston's calculations suggest that a sub-10% rate would *not* result in Alabama's regaining its supposedly "lost" seventh seat. *See* Poston Rep. at 8. At most, Dr. Poston's opinion—based on *four* sources of estimates and *seven* speculative assumptions—

suggests that Plaintiffs might *conceivably* be injured. But Plaintiffs cannot sidestep their "burden of establishing standing," *Corbett*, 930 F.3d at 1228, simply by attaching an unfounded expert report.

"[T]rial courts must act as 'gatekeepers' and are tasked with screening out 'speculative, unreliable expert testimony.'" *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 875 (11th Cir. 2020) (Proctor, J.) (quoting *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)), *petition for cert. filed* (U.S. Jan. 15, 2021) (No. 20–998). And in that context, "courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. 'The courtroom is not the place for scientific guesswork, even of the inspired sort.'" *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996)). Rather, "[p]roposed [expert] testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993); *accord, e.g.*, *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). "[N]either *Daubert*, nor Federal Rule of Evidence 702, requires a trial judge 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Vigneulle ex rel. Vigneulle v. Tahsin Indus. Corp. USA*, No. 2:15–cv–2268–RDP, 2018 WL 1509435, at *2 (N.D. Ala. Mar. 27, 2018) (Proctor, J.) (footnote omitted) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *see also Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987) ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.").

Simply put, Dr. Poston's unreliable report does not—and cannot—support Plaintiffs' actual burden: that Plaintiffs face not a "conceivable" or "theoretical" risk, but a *substantial risk* of future injury. Just as in *New York*, Plaintiffs' "prediction about future injury [is] just that—a prediction." 141 S. Ct. at 536. And if anything, Dr. Poston's report only proves that Plaintiffs' claims, like those in *New York*, are "riddled with contingencies and speculation" and "involve[] a significant degree of guesswork." *Id.* at 535–36. There is simply no other way to describe an unvalidated report based on

four sources of estimates and seven unsupported assumptions. Accordingly, Plaintiffs' claims "are not suitable for adjudication at this time." *Id.* at 537.

For similar reasons, Plaintiffs' claims are not ripe. Ripe claims are those that are "not dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 535 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Plaintiffs' claims are plainly "dependent" on a "contingent future event[] that may not occur as" they "anticipate[]": the results of the House apportionment. Again, it is well within the realm of possibility that Alabama will retain all seven of its House seats even if all undocumented immigrants are included in the apportionment base. *See, e.g.*, Poston Rep. at 3 (opining, based on multiple estimates and assumptions, that if all undocumented immigrants are included, Alabama "ends up ranked in 436th place to receive its 7th seat," *i.e.*, on the very cusp of receiving a seventh seat). And because Plaintiffs' injuries are entirely contingent in nature and may well never come into existence depending on the results of the apportionment adopted by the House of Representatives, a straightforward application of ripeness doctrine to this action "not only brings 'more manageable proportions' to the scope of the parties' dispute, but also 'ensures that'" the Court "'do[es] not engage in policymaking properly left to elected representatives.'" *New York*, 141 S. Ct. at 536 (citations omitted). Indeed, if an upcoming apportionment results in Alabama's receiving seven House seats, the Court will have no need to decide the legality of including undocumented immigrants in the apportionment base.

As *New York* clarified, both standing and ripeness doctrines lead to the inexorable conclusion that this action should be dismissed without prejudice. And if Plaintiffs believe that they have been injured by the eventual results of the apportionment, they may, of course, file suit at that time.

B. Plaintiffs' Attempts To Distinguish *New York* Are Unavailing

Perhaps recognizing that *New York* sounds the death knell over their claims, Plaintiffs struggle mightily against its application. Their three attempts to distinguish *New York* all lack merit.

First, Plaintiffs argue that "the 'contingencies and speculation' that doomed the plaintiffs in *Trump v. New York* are not present here," supposedly because of "President Biden's unequivocal order to count illegal aliens for purposes of apportionment," which, they contend, "will place Alabama at substantial risk of losing political representation." Pls. Resp. at 2. Plaintiffs are wrong for two reasons. Initially, Alabama might well retain all seven House seats even if all undocumented immigrants are included in the apportionment base. The possibility that Alabama might receive only six House seats is, by definition, contingent and speculative. As in *New York*, Plaintiffs are not harmed by "the policy itself"—here, the policy announced in Executive Order 13,986—"'in the abstract.'" *New York*, 141 S. Ct. at 536. Instead, their only alleged injury could arise if and only if Alabama loses a representative in the apportionment. Moreover, even assuming that Alabama would receive only six House seats based on an apportionment base that includes all undocumented immigrants, Plaintiffs are injured only to the extent that the exclusion of undocumented immigrants would afford Alabama an additional House seat. But the plausibility of any such injury cannot be known until the apportionment is completed, and the margins by which states have gained or lost seats are known.

Second, Plaintiffs argue that "[u]nlike the plaintiffs in *Trump v. New York*, Plaintiffs do not challenge 'the apportionment process.'" Pls. Resp. at 4. If Plaintiffs were still truly challenging the Residence Rule, their argument might have some merit (though it would simultaneously render their claims non-redressable). But the Residence Rule, to the extent it pertains to this litigation, has been overcome by events: specifically, the new policy and directive expressed in Executive Order 13,986.

As framed in the First Amended Complaint, this action presents a challenge to the Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018), which Plaintiffs have referred to as the Residence Rule. *See generally* First Am. Compl., Doc. 112 ¶¶ 1–5; *see also* Mem. Op. & Order, Doc. 178, at 5 ("the constitutional challenge [Plaintiffs] make . . . is one to

the Residence Rule").[4] But one would not know that from reading Plaintiffs' Response. Even though the Court ordered that the parties "SHALL . . . address the implications of . . . Executive Order [13,986], particularly as it 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, Plaintiffs' Response barely mentions that Rule. And the reason for that is simple: For all practical purposes in this litigation, the Residence Rule has been rendered irrelevant by Executive Order 13,986. That Executive Order (i) provides that "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," and (ii) directs the Secretary of Commerce to "report the tabulation of total population by State that reflects the whole number of persons whose usual residence was in each State as of the designated census date in section 141(a) of title 13, United States Code, *without* regard to immigration status." Exec. Order 13,986 §§ 2, 3, 86 Fed. Reg. at 7016 (emphasis added). And while these provisions of the Executive Order are consistent with the Residence Rule, they also supersede the Rule, in that the Rule—which was promulgated by the Census Bureau, a subagency of the Department of Commerce—does not bind even the Secretary of Commerce, much less the President. *See Franklin*, 505 U.S. at 799; *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996).

The Executive Order, by contrast, was issued by the President himself. So whatever relief Plaintiffs seek in their lawsuit vis-à-vis the Residence Rule would have no effect in light of the Executive Order because the President may "reform the census, even after the data are submitted to him." *Franklin*, 505 U.S. at 798. That is, "the Secretary's report to the President"—to say nothing of the subordinate Residence Rule—"carries no direct consequences for the reapportionment" and "serves more like a tentative recommendation than a final and binding determination." *Id.* So any

[4] As reflected in its title, the Census Bureau's Final 2020 Residence Criteria and Residence Situations is not, in fact, a "rule." Defendants nevertheless refer to it as the "Residence Rule" for consistency with the other parties and the Court.

changes the Court might order to the Residence Rule would fall by the wayside—and not redress any alleged injury—in light of the Executive Order that has been issued at, and therefore operates at, the highest level of government. Simply put, "[t]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level." *Cmty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003).

Plaintiffs do not seriously contest this conclusion. Instead, they argue that the Court may "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." Pls. Resp. at 10 (quoting *Utah v. Evans*, 536 U.S. 452, 463 (2002)). But this contention only suggests that this case is now materially *indistinguishable* from *New York*, in which the plaintiffs also sought (and, before it was vacated by the Supreme Court, actually obtained) relief governing the content of the Secretary's report. *See* 141 S. Ct. at 534.

In a desperate effort to distinguish *New York*, Plaintiffs place much stock in the Court's prior determination that they "do not challenge 'the actual division of congressional districts' . . . but instead 'a practice that might affect a future division of districts.'" Pls. Resp. at 5 (quoting Mem. Op. & Order, Doc. 178, at 5). But the Court made that determination months before Executive Order 13,986 superseded the relevant portion of the Residence Rule. As explained above, Executive Order 13,986 has effectively nullified Plaintiffs' challenge to the Rule. So to the extent Plaintiffs' Response suggests that this action has now evolved from a challenge to the now-irrelevant (at least for purposes of this litigation) Residence Rule into a challenge to Executive Order 13,986, the Court is free to—and should—reconsider its earlier interlocutory opinion. *See infra* Part II.[5]

[5] Plaintiffs defensively contend that the Court's earlier opinion is law of the case. Pls. Resp. at 5. It is no such thing. "It is clear . . . that a court's previous rulings may be reconsidered as long as the case remains within the jurisdiction of the district court." *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991) (internal quotation marks omitted). "Consequently, law of the case applies only

Just like New York's challenge to the exclusion of certain undocumented immigrants from the apportionment base in *New York*, Plaintiffs' attempt to exclude undocumented immigrants from the apportionment base here squarely constitutes a "challenge [to] 'the apportionment process.'" *Cf.* Pls. Resp. at 4. So they are just "[]like the plaintiffs in *Trump v. New York*." *Cf. id.*

Finally, Plaintiffs analogize their challenge to the pre-apportionment challenges in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), and *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999). *See* Pls. Resp. at 3–5. But as explained in *New York*, those pre-apportionment cases concerned challenges to "census operations" that would have "predictably change[d] the count." 141 S. Ct. at 536. Specifically, those cases concerned challenges to census field operations: *Department of Commerce v. New York* concerned the legality of placing a citizenship question on the 2020 census questionnaire, *see* 139 S. Ct. at 2561; and *Department of Commerce v. U.S. House of Representatives* concerned two sampling procedures to be employed during the 2000 census field operations, *see* 525 U.S. at 324–26. Challenging census-field-operation procedures pre-apportionment makes abundant sense: field operations constitute a multibillion-dollar operation that can involve hundreds of thousands of enumerators. Unlike apportionment, census field operations cannot easily be redone. *See* 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, § 209(a)(8), 111 Stat. 2481 (1997) ("[T]he decennial enumeration of the population is a complex and vast undertaking," so "it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted.").

This action, however, has nothing to do with census field operations. Because the 2020 census questionnaire did not inquire as to citizenship status, undocumented immigrants could theoretically be excluded, as the *New York* court recognized, only through the use of "suitable administrative

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where there has been a final judgment." *Id.* (internal quotation marks omitted). There has been no final judgment here, so the law-of-the-case doctrine does not apply.

records." 141 S. Ct. at 535. So this action bears no resemblance to the challenges in *Department of Commerce v. New York* and *Department of Commerce v. U.S. House of Representatives*. And in all events, census field operations have concluded. As the *New York* court put it, "[t]he count here is complete; the present dispute involves the apportionment process." 141 S. Ct. at 536. So, too, here. *See also* Joint Mot., Doc. 193, at 4 ("the census count has now been completed").

C. At a Minimum, the Court Should Continue the Stay

In last month's Joint Status Report, the parties "all agree[d] that a stay of proceedings should be extended" because, in part, "the broader results of the apportionment count[] could affect or simplify questions regarding Plaintiffs' standing." Doc. 194 at 1. The same reasoning applies today. The Census Bureau's "current schedule points to April 30, 2021, for the completion of the apportionment counts." Dr. Ron Jarmin, U.S. Census Bureau, "2020 Census Processing Updates," *Director's Blog* (Feb. 2, 2021), https://www.census.gov/newsroom/blogs/director/2021/02/2020-census-processing-updates.html. As Defendants anticipate that the apportionment counts will be completed in just over ten weeks, there is little reason to proceed now with discovery that may very well prove to be all for naught—yet would consume resources and would divert the time and attention of agency personnel who are otherwise occupied in completing the census.

Citing the inapt *U.S. House of Representatives* opinion, Plaintiffs argue that "further delay may 'result in extreme—possibly irremediable—hardship.'" Pls. Resp. at 3. But Plaintiffs do not explain what hardship (let alone what "irremediable" hardship) they might face, or why this supposed hardship seemingly did not exist last month when Plaintiffs moved the Court to extend the stay. *See* Joint Mot., Doc. 193. Nor could they; the Supreme Court has made clear that apportionment harms may be remedied after the apportionment. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 463 (2002) ("Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and

several months would remain prior to the first post–2000 census congressional election."). And while the *New York* dissent argued that "[w]aiting to adjudicate plaintiffs' claims until after the President submits his tabulation to Congress . . . risks needless and costly delays in apportionment," 141 S. Ct. at 537 (Breyer, J., dissenting) (emphasis omitted), that argument failed to convince the *New York* majority and likewise should not persuade this Court. *See id.* (majority opinion) (holding that the *New York* plaintiffs' claims "are not suitable for adjudication at this time").

II. THIS SINGLE-JUDGE COURT CAN NO LONGER PROVIDE PLAINTIFFS WITH ANY RELIEF

As Plaintiffs note, *see* Pls. Resp. at 10–11, Executive Order 13,986 may not entirely destroy redressability as a purely theoretical matter. Putting aside the question whether Plaintiffs may challenge Executive Order 13,986 under their First Amended Complaint, a challenge to the inclusion of undocumented immigrants in the apportionment base could, under Supreme Court precedent, conceivably be redressed at least in part by "a declaration leading, or an injunction requiring, the Secretary [of Commerce] to substitute a new 'report' for the old one." *Evans*, 536 U.S. at 463; *accord* Mem. Op., Doc. 84, at 15–22. And, in fact, the First Amended Complaint's Prayer for Relief includes one request that does not relate to the Residence Rule, asking the Court to "[d]eclar[e] that any apportionment . . . that does not use the best available methods to exclude illegal aliens from the apportionment base used to apportion congressional seats and Electoral College votes among the states would be unconstitutional." First Am. Compl., Doc. 112, ¶ 144.b. But shifting the focus away from the Residence Rule in this way would present a different obstacle to this Court's ability to afford Plaintiffs relief: namely, the relief would be unavailable in the absence of a three-judge panel convened under 28 U.S.C. § 2284.

As explained above, on October 9, 2020—months before the President issued Executive Order 13,986—the Court denied Plaintiffs' motion to appoint a three-judge court. Mem. Op. & Order, Doc. 178. "To convene a three-judge court, the [C]ourt must first determine if the case satisfies

the threshold jurisdictional requirements of [28 U.S.C.] § 2284(a)." *Id.* at 4.[6] Section 2284 provides that "[a] district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). Given the scope of the action at that time, the Court framed "the question" as "whether the constitutional challenge [Plaintiffs] make, which is one to the Residence Rule . . . is a challenge to the apportionment of congressional districts." Mem. Op. & Order, Doc. 178, at 5. Answering that question in the negative, the Court declined to appoint a three-judge court: "Plaintiffs' challenge to the Residence Rule is not a challenge to the actual division of congressional districts but rather a challenge to a practice that might affect a future division of districts. . . . Thus, because Plaintiffs do not challenge the apportionment of congressional districts, Plaintiffs' motion for a three-judge court is due to be denied." *Id.*

The Court should now reconsider its earlier opinion. *See Vintilla*, 931 F.2d at 1447 (in the absence of final judgment, courts may reconsider their earlier interlocutory orders); *supra* note 5. If Plaintiffs are permitted to continue litigating this case under the First Amended Complaint, it is now abundantly clear that a challenge to the Residence Rule would not afford Plaintiffs any relief. And to the extent Plaintiffs are not truly pursuing a challenge to the Residence Rule—a "'precusor[] to the ultimate apportionment,'" *id.* at 6—they are instead challenging the apportionment itself. Executive Order 13,986 provides that "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." Exec. Order 13,986 § 2, 86 Fed. Reg. at 7016 (emphases added). Indeed, Plaintiffs' redressability argument is premised on the Court's declaring that the apportionment policy in Executive Order

[6] "[T]he Supreme Court has not yet formally resolved whether convening a three-judge court under [28 U.S.C.] § 2284(a) is a jurisdictional requirement." *Igartúa v. Obama*, 842 F.3d 149, 162 (1st Cir. 2016) (Toruella, J., concurring in part and dissenting in part); *see also id.* at 152 n.4. Regardless of whether § 2284 is jurisdictional, it is mandatory in nature. *See Shapiro v. McManus*, 577 U.S. 39, 42–44 (2015).

13,986 is unconstitutional. *See* Pls. Resp. at 10–11. And as *New York* and *Franklin* both demonstrate, challenges to the composition of the census apportionment base are proper fodder for three-judge courts. Just like New York's challenge to the exclusion of certain undocumented immigrants from the apportionment base in *New York* and Massachusetts' challenge to the inclusion of overseas federal employees in the apportionment base in *Franklin*, Plaintiffs' attempt here to exclude undocumented immigrants from the apportionment base constitutes a "challeng[e]" to "the apportionment of congressional districts," 28 U.S.C. § 2284(a), so this single-judge Court may not afford Plaintiffs *any* relief. *See Shapiro v. McManus*, 577 U.S. 39, 43 (2015); Mem. Op. & Order, Doc. 178, at 4.

The Court's earlier Order, Doc. 178, might be read to suggest that § 2284 "implies that, in order to necessitate the convening of a three-judge court, the challenge must be to an existing apportionment." *City of Phila. v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980) (cited in Mem. Op. & Order, Doc. 178 at 6). But if *Philadelphia*'s analysis were correct, the Supreme Court would have lacked appellate jurisdiction to entertain the appeal in *New York*, which concerned a pre-apportionment dispute on appeal from a three-judge district court. *See, e.g.*, *Mobay Chem. Corp. v. Costle*, 439 U.S. 320, 321 (1979) (per curiam) ("The three-judge court was thus improperly convened . . . and this Court does not have jurisdiction to entertain a direct appeal from the judgment in such case.").

And *Philadelphia*'s analysis fails on its own terms. Nothing in § 2284 suggests that the phrase "the apportionment" should be limited only to past apportionments. Had Congress wished to limit § 2284's application only to *existing* apportionments, it could easily have done so—by inserting the word "existing" in between "the" and "apportionment," just as the *Philadelphia* court effectively did. That Congress did not intend such a limitation is also evident from § 2284's legislative history. *Cf. Zedner v. United States*, 547 U.S. 489, 501 (2006) (confirming statutory interpretation with legislative history). The Senate Report accompanying the bill that amended § 2284 indicated that "three-judge courts would be retained . . . in *any* case *involving* congressional reapportionment." S. Rep. No. 94–

204, at 1 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988 (emphases added). Finally, the apportionment is a once-in-a-decade event and it is entirely reasonable to refer to an impending apportionment as "the apportionment," much as one discussing "the presidential election" in October 2020 would reasonably be understood to be referring to the presidential election that took place in November 2020, not the one that took place in November 2016.

In short, the redress that Plaintiffs now seek can only be provided by a three-judge court—if it can be provided at all. But the Court need not begin the process of convening a three-judge court, *see* 28 U.S.C. § 2284(b)(1), because "[a] three-judge court is not required where," as here, "the district court itself lacks jurisdiction of the complaint," *Shapiro*, 577 U.S. at 44 (internal quotation and alteration marks omitted); *see Wertheimer v. Fed. Election Comm'n*, 268 F.3d 1070, 1072 (D.C. Cir. 2001) ("[A]n individual district court judge may consider threshold jurisdictional challenges prior to convening a three-judge panel.").

CONCLUSION

For these reasons, the Court should dismiss this action for lack of subject-matter jurisdiction. In the alternative, the Court should (i) extend the existing stay until after the apportionment and, if Plaintiffs can demonstrate standing at that time, (ii) reconsider its earlier Order denying Plaintiffs' motion to convene a three-judge court, Doc. 178, and "notify the chief judge of the circuit" that a three-judge court must be convened. 28 U.S.C. § 2284(b)(1).

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