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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CITY OF SAN JOSE, CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 5:20-cv-05167-LHK-RRC-EMC
Case No. 5:20-cv-05169-LHK-RRC-EMC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: October 8, 2020
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Honorable Richard R. Clifton
Honorable Lucy H. Koh
Honorable Edward M. Chen

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INTRODUCTION

Defendants' opposition concedes everything but the bottom line. They concede that, under the Constitution and relevant statutes, the census must count all persons who reside in each State. They concede that undocumented immigrants are persons. They do not dispute that millions of undocumented persons have put down roots in this country and lived here with their families for many years. They do not dispute that every administration for the last 230 years has counted all persons who reside in a State, regardless of their legal status, except for the two classes of persons expressly excluded by the Constitution. And they do not dispute that the Senate Legislative Counsel and the Department of Justice, under administrations of both parties, have repeatedly concluded that excluding undocumented immigrants from the census would violate the Constitution. Indeed, Defendants recently admitted in open court in parallel litigation that they cannot identify any historical support for their contrary position.

Despite the cascade of unequivocal text, structure, drafting history, and centuries of practice, Defendants insist that the President has the "discretion" to exclude all undocumented persons. According to Defendants, the terms "inhabitant" and "usual residence" can reasonably be understood to be limited to those who reside somewhere with permission. But no contemporaneous or current dictionary supports Defendants' decidedly idiosyncratic understanding, and none of the historical evidence they cite for it withstands scrutiny. Quite to the contrary, the record is crystal clear that when the Framers, the drafters of the Fourteenth Amendment, and the Congress that enacted the Census and Reapportionment Acts mandated that the census enumerate all persons residing in each State, they meant all "inhabitants" in its ordinary, *expansive* sense. And consistent historical practice for 230 years following that mandate demolishes the notion that the President is free to take a starkly different path.

With no place to turn on the merits, Defendants raise a raft of justiciability arguments, but those are equally meritless. Like Defendants' recent effort to add a citizenship question to the census, the Apportionment Exclusion Order has caused widespread fear and confusion in immigrant communities and will predictably lead to a less accurate enumeration, with concrete consequences for apportionment and funding. Defendants insist that these harms are too

speculative, too indirect, and not sufficiently redressable, but those arguments largely ignore or mischaracterize Plaintiffs' detailed fact and expert declarations. Defendants' similar arguments in related cases have been rejected by every court that has considered them, including a painstaking analysis by the Southern District of New York that thoroughly rejected all of the arguments Defendants raise here. *See New York v. Trump*, No. 20-CV-5770 (RCW) (PWH) (JMF), 2020 WL 5422959, at *9-25 (S.D.N.Y. Sept. 10, 2020) ("*New York II*"), *appeal filed*, No. 20-3142 (2d Cir. Sept. 16, 2020).

Defendants also claim that the Order's qualifying language renders Plaintiffs' malapportionment and vote dilution concerns merely theoretical, and that review must therefore await an actual unlawful apportionment. But the Order is not the least bit tentative: It announces "the policy of the United States" to exclude all undocumented immigrants. The President reiterated his "commitment" to this policy in a signing statement. And Defendants have since argued to the Southern District of New York that enjoining the Order will irreparably injure them—a claim that would make sense only if Defendants intend to implement the Order. Defendants' opposition brief, moreover, confirms their belief that full implementation of the Order is permitted by law, and the dubious possibility that the administration will decide that implementation is not feasible—a possibility that exists for every announced government action—does not render the challenge unripe. The Order is causing serious harm to Plaintiffs and the public, and it requires this Court's swift intervention.

ARGUMENT

I. PLAINTIFFS HAVE STANDING

Plaintiffs have established two categories of injuries that satisfy the standing requirement: (1) lost political representation in Congress and the Electoral College, and (2) decreased census participation and diverted resources by Plaintiffs to attempt to mitigate this effect.

A. The Order Will Cause Plaintiffs to Lose Political Representation

Plaintiffs need only show a "substantial risk" that the exclusion of undocumented immigrants from the apportionment count will cause Plaintiffs to lose political representation, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("*New York I*"); *Susan B.*

Anthony List v. Driehaus, 573 U.S. 149, 158 (2014).[1] They have amply satisfied that requirement.[2] Defendants make no attempt to rebut the evidence that both California and Texas are "highly likely"—at a 90% confidence interval—to lose at least one seat in the House of Representatives. *See* Gilgenbach Decl. ¶¶ 5, 22-23, 29-30, 32-33, 40. Nor do Defendants contest that these injuries are traceable to the Apportionment Exclusion Order and redressable by the relief Plaintiffs seek.

Defendants argue that Plaintiffs' loss of representation is nonetheless "conjectural" and "speculative" because it is unknown whether the Secretary will implement the Apportionment Exclusion Order. Defendants emphasize that the Order commands the exclusion of undocumented immigrants only "to the maximum extent feasible" and to "the maximum extent of the President's discretion under the law"—and orders the Secretary to take action "to the extent practicable."[3] *See* Opp. at 5-6; 85 Fed. Reg. 44,679, 44,680. Based on that qualifying language, they suggest that the Secretary might not provide the President an apportionment count that excludes all undocumented immigrants or the President might decide not to exclude them. Opp. at 6-7.

The Ninth Circuit rejected this same argument in *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1239-40 (9th Cir. 2018) ("*San Francisco*"). There, plaintiffs challenged an executive order directing the Attorney General and the Secretary of Homeland Security to ensure—"in their discretion and to the extent consistent with law"—that so-called "sanctuary jurisdictions" do not receive federal grants. *Id.* at 1232-33. The government argued that the

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[1] Plaintiffs' memorandum in support of their motion for partial summary judgment is cited hereinafter as "Br." Defendants' opposition and motion to dismiss is cited hereinafter as "Opp." Unless specifically designated otherwise, all numerical exhibit citations (*e.g.*, "Ex. 1") refer to exhibits attached to the Declaration of Shannon D. Lankenau in Plaintiffs' opening memorandum, and all alphabetical exhibit citations (*e.g.*, "Ex. A") refer to exhibits attached to the Declaration of Shannon D. Lankenau filed concurrently with this reply.

[2] With respect to associational standing, Defendants mistakenly claim that Plaintiffs "fail[ed] to make specific allegations establishing that at least one *identified* member [of BAJI] had suffered or would suffer harm." Opp. at 12 n.4 (Defendants' emphasis; citation omitted). That is incorrect. Plaintiffs identified Plaintiff Yilma as a member of BAJI. *See* Yilma Decl. ¶ 2.

[3] Defendants raise this argument as a matter of constitutional ripeness. As explained below, however, the constitutional ripeness and standing inquiries merge in this case and the "substantial risk" test for future harm must therefore be applied.

order's qualifying language limited its scope by expressly preserving the officials' discretion and directing them to block federal grants only "to the extent consistent with law." *Id.* The Court rejected that argument, explaining that the executive order spoke in mandatory language, and its "savings clause" "does not and cannot override its meaning." *Id.* at 1240. The Court noted that a contrary view would lead to an "intellectual cul-de-sac": "If 'consistent with law' precludes a court from examining whether the Executive Order is consistent with law, judicial review is a meaningless exercise, precluding resolution of the critical legal issues." *Id.*

The same analysis controls here. The President announced in the Order that it is the "policy of the United States" to exclude all undocumented immigrants from the apportionment count. 85 Fed. Reg. at 44,680. The express goal of this policy is to shift political representation away from California and other States with proportionately large populations of undocumented immigrants. *Id.* The President directed the Secretary to take actions to comply with the new official policy. *Id.* And he confirmed later that day his "commitment" "to exclude illegal aliens from the apportionment base following the 2020 census." Ex. 8, *Statement From the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment.[4]

Defendants emphasized the firmness of that commitment in their motion for a stay of the injunction in *New York II*.[5] There, they argue that the injunction will irreparably harm them by forcing "the Secretary and the President" to submit to Congress an apportionment count "that do[es] not reflect the President's policy judgment."[6] This representation to the Southern District of New York acknowledges that, absent the injunction, the Secretary and the President will

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[4] Many if not most executive orders have similar qualifying language. For example, many presidential orders (including this one) contain "General Provisions" that include the qualification that the order "shall be implemented consistent with applicable law and subject to the availability of appropriations." 85 Fed. Reg. at 44,680; *see also, e.g.*, Executive Order 13947, Lowering Drug Prices by Putting America First, 85 Fed. Reg. 5,9171, 5,9172 (Sept. 18, 2020) (same); Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161, 45,172 (Sept. 27, 2017) (same). But Plaintiffs are unaware of any court holding that such language renders an executive order unripe.

[5] *See* Ex. A, Mot. for Stay Pending Appeal, ECF No. 172 (Sept. 16, 2020).

[6] *Id.* at 7.

"likely" submit an apportionment count that does reflect the President's policy judgment, by excluding all undocumented immigrants. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (irreparable harm must be "likely" to justify a stay). And it flatly contradicts their suggestion to this Court that Plaintiffs face no "substantial risk" that the Order will be implemented.

Rather than rendering compliance less likely, moreover, the Apportionment Exclusion Order's directive to carry out the President's policy "to the *maximum* extent feasible" underscores Defendants' determination to implement the policy to the fullest. The Apportionment Exclusion Order contains no minimum standards for data accuracy or reliability in the identification of undocumented immigrants for purposes of their exclusion. And Defendants have shown no likelihood that the Secretary will determine that he cannot substantially comply with the Order. In Secretary Ross's earlier attempt to add a citizenship question to the census (a precursor to the Order), he was willing to publicly state a "contrived" reason for his actions and override the recommendations of career Census Bureau professionals. *New York I*, 139 S. Ct. at 2575. There is no reason to believe that now, at the apex of a years-long effort, the Secretary will decide that data quality standards pose an insurmountable obstacle. The same is true of the purported legal qualification "to the maximum extent of the President's discretion under the law." 85 Fed. Reg. at 44,680. Both the Order itself and Defendants' opposition brief expressly declare Defendants' view that it *is* within the President's legal discretion to categorically exclude all undocumented immigrants. The inclusion of these "savings clauses" in the Order does not undermine the substantial risk that Plaintiffs will lose political representation. *San Francisco*, 897 F.3d at 1239.[7]

Defendants also note that previous apportionment cases have generally been decided after the apportionment determination. *See* Opp. at 8. Yet the Supreme Court has not suggested that these cases may *not* be brought prior to the apportionment determination. As in other types of cases, Plaintiffs do not need to prove their apportionment harms have already occurred to satisfy

[7] Defendants reference Plaintiffs' claims under 13 U.S.C. § 195 and argue it is uncertain whether Defendants will impermissibly employ statistical sampling to exclude undocumented immigrants. *See* Opp. at 6-7. That issue is not yet before this Court, because Plaintiffs have not moved for summary judgment on those claims, and Defendants have not moved to dismiss them. *Id.* at ii; Pls.' Mots. at i-ii.

Article III; they need only show a "substantial risk" that these harms will occur. *See Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316, 332-33 (1999) (standing established prior to apportionment where it was "substantially likely" that certain plaintiffs would suffer voter dilution if census employed statistical sampling); *Carey v. Klutznick*, 508 F. Supp. 404, 408-10 (S.D.N.Y. 1980) (standing established prior to apportionment where "alleged harm" that would result from expected undercount of New York State population was "sufficiently concrete").

B. The Order Is Harming Plaintiffs by Deterring Undocumented Immigrants and Those Domiciled with Them From Participating in the Census

In addition to the future loss of political representation, Plaintiffs have established that the Order is causing them *present* injuries by discouraging undocumented persons and those with whom they live from participating in the census. *See* Br. at 11, 13. That decreased participation disproportionately degrades the census data on which the government Plaintiffs rely for federal grants and local governance programs. Barreto Decl. ¶¶ 37-39, 44; Westall Decl. ¶¶ 21-36; Dively Decl. ¶ 7; Ellis Decl. ¶¶ 5-11; Ramsey Decl. ¶¶ 3-6. This critical data is tied directly to losses or gains in federal funding. Reamer Decl. ¶¶ 17-22. The data also includes important demographic information that Plaintiffs and local governments use for both public services and their own redistricting. *See* Westall Decl. ¶¶ 21-36; Bodek Decl. ¶¶ 9-21; Crain Decl. ¶¶ 12-20; Boutin Decl., Ex. A at 799:1-16 & Ex. B at 1040:7-1041:10; Dively Decl. ¶¶ 6, 8-9; Ellis Decl. ¶ 14; Shah Decl. ¶¶ 4-8; *see also New York II*, 2020 WL 5422959, at *4, *14. The decreased participation, moreover, is compelling organizational Plaintiff BAJI to divert resources to counteract the chilling effects of the Order. *See* BAJI Decl. ¶¶ 17-20; Barreto Decl. ¶¶ 37-39, 44. Plaintiffs' declarations establish that both types of injuries are actual and concrete, fairly traceable to the Order, and redressable by a favorable ruling from this Court. Defendants challenge these bases for standing as too speculative and too indirect, but fail to distinguish controlling precedent that has found standing under strikingly similar circumstances. *See* Opp. at 10-16.

First, although Defendants argue that the declarations are "impermissibly conjectural, conclusory, and hearsay," they do not dispute the facts in Plaintiffs' declarations supporting the

existence of a chilling effect. *Id.* Far from being "conjectural" or "conclusory," Plaintiffs' declarations provide detailed evidence that the Order is causing widespread fear that participation in the census will lead to adverse immigration consequences. *See, e.g.*, Gyamfi Decl. ¶¶ 11-16 (explaining the negative effect of the Order on BAJI members and the immigrant communities BAJI serves and stating that in "more than half" of the direct interactions from BAJI's Civic Engagement Team, community members express concern that the government will use their census responses to deport them). Plaintiffs' expert, Dr. Barreto, explains in detail how the Order "generates the perception of real and immediate threat for undocumented immigrants" and has the effect of "reduc[ing] participation in the 2020 Census." Barreto Decl. ¶ 14.

This evidence is sufficient to establish an injury in fact. The Supreme Court, this Court, and the Southern District of New York have all recently found standing under these or similar circumstances. In *New York I*, 139 S. Ct. 2551, the plaintiffs "assert[ed] a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count." *Id.* at 2565. The Supreme Court held that the evidence showed a "sufficient likelihood" that the challenged decision would cause an undercount, which was a sufficient injury for standing. *Id.* This Court reached the same conclusion just weeks ago in *National Urban League v. Ross*.[8] There, the Court issued a provisional order finding that the plaintiffs had standing to challenge a plan to shorten the census because the plan would "degrade … census data," force organizational and county plaintiffs "'to divert resources from other programs and projects' to 'alleviate [resident] confusion,'" and "diminish . . . localities' funding."[9] Finally, the Southern District of New York recently reached the same conclusion in parallel litigation to this case. *See generally New York II*, 2020 WL 5422959. In a detailed analysis, the three-judge panel rejected every

[8] *See* Ex. B, No. 20-v-05799, ECF No. 96 (N.D. Cal. Sept. 10, 2020) (Koh, J.) ("National Urban League Order").

[9] *Id.* at 12-13 (citation omitted).

argument Defendants press here and concluded that the plaintiffs had standing to challenge the Apportionment Exclusion Order. *Id.* at *9-25.

The analyses in *New York I*, *National Urban League*, and *New York II* apply with equal force here. As Dr. Barreto explained, the Order "sends a signal" to immigrant communities that the "government [is] monitoring citizenship status as it relates to the 2020 Census," and this signal erodes trust in the government and deters census participation. Barreto Decl. ¶¶ 19, 22-27. The Order also chills participation by conveying to undocumented immigrants that it does not matter whether they participate, because they will not be counted anyway. *See id.* ¶¶ 75, 94. These and other findings from Dr. Barreto, along with plaintiff declarations, provided the basis for *New York II* to conclude for standing purposes that the Apportionment Exclusion Order is causing a differential undercount in the census. This Court should reach the same conclusion.

Defendants insist that this Court should dismiss as hearsay Plaintiffs' testimony describing the chilling effect of the Order. *See* Opp. at 10-11. That testimony is not hearsay, however, to the extent it is offered to show state of mind (i.e., fear of deportation) rather than for its truth (i.e., that the Order will *actually* cause deportation) or to show the effects that statements by those in affected communities about the Order have had on Plaintiffs, including Plaintiffs' diversion of resources to encourage continued participation in the Census. *See* Fed. R. Evid. 801(a), (c)(2); *see also New York II*, 2020 WL 5422959, at *11 n.7 (rejecting hearsay argument). And regardless, expert witnesses like Dr. Barreto "may rely on inadmissible hearsay in forming their opinions, so long as it is of a type reasonably relied upon by experts in their field," which is clearly the case here. *United States v. Cazares*, 788 F.3d 956, 977 (9th Cir. 2015) (citing Fed. R. Evid. 703).

Defendants next criticize Dr. Barreto for "fail[ing] to consider" the Census Bureau's 2019 Census Test Report, which measured the effect of adding a citizenship question to the census. Opp. at 11 (citing Abowd Decl. ¶ 13; *2019 Census Test Report*, Census Bureau (Jan. 3, 2020), https://www2.census.gov/programs-surveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf). Defendants emphasize that the Report found that the "overall" response rates did not differ significantly with or without the

citizenship question. *Id.* But Defendants are wrong on the first point and misleading on the second. Dr. Barreto *did* address the 2019 Census Test Report at length. *See* Barreto Decl. ¶¶ 27, 37, 52-57. And Defendants' artful characterization of the "overall" response rate ignores the Report's critical finding that response rates declined significantly for certain subgroups including noncitizens and Hispanics.[10] *See* Barreto Decl. ¶¶ 27, 37, 52-57; *see also New York II*, 2020 WL 5422959, at *12 n.8. The lower response rate from noncitizens and Hispanics is key because the census is concerned not just with *overall* accuracy but also the "*distributive* accuracy" among the States. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (emphasis added). And because California and Texas have a larger share of noncitizens and Hispanics relative to other States, the differential response rate found in Defendants' own study corroborates Plaintiffs' injury. *See* Br. at 9-11 & n.13.

Immediately after (incorrectly) criticizing Dr. Barreto *for not* relying on the Census Bureau's study about the citizenship question, Defendants complain that Dr. Barreto's analysis draws on studies addressing the effect of "a citizenship question on the census," which (for purposes of *this* argument) they say is "far attenuated from the issues in this case" regarding the Apportionment Exclusion Order. Opp. at 10-11. Setting aside the obvious inconsistency, Defendants essentially fault Dr. Barreto for relying on the best available evidence rather than perfect evidence. But perfect evidence is not required. An injury need not be "literally certain"; there need only be a "'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013); *see also* Nat'l Urban League Order at 13. Plaintiffs have amply made that showing here.[11]

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[10] *Id.* at ix-x.

[11] Notably, Defendants' surprise announcement of their intent to exclude undocumented immigrants in the midst of the census process is *the reason* the best available evidence is limited, and they cannot now complain about the effects of the exigency they created. *See National Urban League* Order at 13-14 (emphasizing the "predictable harms" of "last-minute change[s]" to the Census collection process); *see also New York II*, 2020 WL 5422959, at *16 ("Defendants' *own conduct* has forced Plaintiffs' hands" because "the President waited until July 21, 2020, when the census was in full swing, to issue his Presidential Memorandum.").

Second, Defendants dispute that any undercount would be fairly traceable to the Order. *See* Opp. at 13-15. They claim that any chilling effect arises from the irrational fears of immigrants and "unreasonable" interpretations of the Order by third parties, such as Spanish-language journalists and media outlets. *Id*. at 14. Defendants introduce no evidence to support their claim that immigrants' fears are "unreasonable," but regardless, this argument is foreclosed by the Supreme Court's decision in *New York I*. The government argued there that the "chain of causation" was rendered impermissibly "tenuous" by "intervening . . . third-party action" and by "unfounded fears that the Federal Government will . . . us[e] noncitizens' answers [on the census] against them for law enforcement purposes." *New York I*, 139 S. Ct. at 2565-66. The Supreme Court definitively rejected that argument, holding that the "predictable effect of Government action on the decisions of third parties" was sufficient to show traceability, *even if* those third parties acted irrationally or illegally. *Id.*[12]

Defendants argue that the chain of causation was more direct in *New York I* than it is in this case, because the chilling effect there resulted from a citizenship question "directed at census respondents," whereas the chilling effect here stems from independent news coverage of the Order. Opp. at 15. But the Order itself tells undocumented immigrants that they will not be counted. Moreover, the Supreme Court held squarely in *New York I* that establishing the "predictable effect of Government action" is sufficient for traceability, and Plaintiffs here have amply demonstrated the existence and predictable effects of Spanish-language reporting about the Order. *New York I*, 139 S. Ct. at 2566; *see also New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 788 (S.D.N.Y. 2018) ("Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant." (citation omitted)); *New York II*, 2020

[12] The Supreme Court also indicated that its prior decision in *Clapper v. Amnesty International*, 568 U.S. at 410—on which Defendants rely here and relied in *New York I*—is not to the contrary. *Clapper* identified a chain of nearly half-a-dozen "highly speculative" contingencies that would have had to align for the plaintiffs' injuries to materialize in the future. *Id.* Nothing of the sort is true here. Rather, the evidence shows that Plaintiffs have *already* suffered, and are continuing to suffer, concrete economic injuries by diverting resources to respond to the Order.

WL 5422959, at *22 (Defendants' counterarguments "are little more than a rehash of Defendants' arguments in the citizenship question litigation, which were rejected.").

Third, Defendants argue that this Court cannot redress the chilling effect caused by the Order. Opp. at 15-16. They claim it is "speculative" whether a significant number of immigrants "currently deterred from participating in the census would decide to participate if this Court granted Plaintiffs relief." *Id.* at 16. Plaintiffs have submitted expert testimony to the contrary, however, showing that "reversals or limitations imposed on executive actions may have measurable consequences on promoting trust" and "increas[ing] participation." Barreto Decl. ¶¶ 80-83; *see also* Gyamfi Decl. ¶¶ 22-23. Defendants balk at Dr. Barreto's conclusion, yet instead of offering competing evidence, say only that "it is hard to imagine that precluding the Secretary from complying with the Memorandum . . . would alter the kind of mistrust that Plaintiffs allege to be in effect currently." Opp. at 16. But the extent of Defendants' imagination is not evidence, and Plaintiffs' actual evidence is more than sufficient to show that a ruling from this Court prohibiting Defendants from excluding undocumented immigrants would mitigate the Order's chilling effect. Under Supreme Court precedent, that is enough. *See Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (finding standing when the "risk [of injury] would be reduced to some extent if petitioners received the relief they seek").

In sum, the evidence establishes that the Order is harming Plaintiffs by deterring participation in the census, and that a favorable ruling from this Court would redress that injury. The evidence includes expert analysis, the Census Bureau's own Report on the citizenship question, and testimony from numerous fact witnesses, many of whom the Census Bureau itself relies on as partners. Defendants have submitted *nothing* on the other side of the ledger. This record is more than enough to establish standing.

II. THE DISPUTE IS RIPE FOR ADJUDICATION

The ripeness inquiry involves "both 'a constitutional and prudential component.'" *Safer Chems., Healthy Fams. v. EPA*, 943 F.3d 397, 411 (9th Cir. 2019) (citation omitted). Because constitutional ripeness requires cases to present issues that are "definite and concrete, not hypothetical or abstract," it "is often treated under the rubric of standing." *Safer Chems.*, 943

F.3d at 411 (citation omitted); *Susan B. Anthony List*, 573 U.S. at 157 n.5 ("[T]he Article III standing and ripeness issues in this case 'boil down to the same question.'" (citation omitted)). Thus, because Plaintiffs have shown Article III standing, they have also satisfied constitutional ripeness.

Defendants' prudential ripeness arguments fail for similar reasons. Prudential ripeness is considered in view of "the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction is 'virtually unflagging.'" *Id.* at 167 (citation omitted). This inquiry requires the Court "to first consider the fitness of the issues for judicial review, followed by the hardship to the parties of withholding court consideration." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). Both prongs of this test are "easily satisfied" here. *New York II*, 2020 WL 5422959, at *24 (quoting *Susan B. Anthony List*, 573 U.S. at 167).

To start, this case presents a sufficiently "concrete factual situation" fit for judicial review. *See Oklevueha*, 676 F.3d at 838. Defendants' contention that this case "would benefit from further real-world factual development," Opp. at 7-8, ignores the "purely legal" nature of the dispute. *See Susan B. Anthony*, 573 U.S. at 167 (citation omitted); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434-35 (9th Cir. 1996) ("Legal questions that require little factual development are more likely to be ripe." (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985))). The Apportionment Exclusion Order's plan to exclude undocumented immigrants from the apportionment count unquestionably violates the Constitution and the Census and Reapportionment Acts. *See infra* at 14-27. Given the Order's clear mandates, this Court should "presume that the Secretary and the Census Bureau will abide by the President's directives and work diligently to help exclude illegal aliens from the apportionment base to the maximum extent possible." *New York II*, 2020 WL 5422959, at *25 (citing *USPS v. Gregory*, 534 U.S. 1, 10 (2001)). Defendants fail to identify any new facts that may arise that would cure the Order's obvious defects. Nor does the Order's language conditioning implementation to the extent "feasible" and "practicable" support delaying judicial review. *See supra* at 3-6; *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 529 (N.D. Cal.

2017) ("[T]he possibility that the Government 'may' choose to interpret the Order's broad language narrowly or 'may' choose not to enforce it . . . does not justify deferring review.").

To be sure, some apportionment cases have been resolved after the apportionment, Opp. at 8, while others have been resolved beforehand. *See supra* at 5-6. What is determinative for ripeness purposes is that "this is not an abstract disagreement but rather involves the application of well-developed law . . . to an existing case and controversy." *Oklevueha*, 676 F.3d at 838. Because the "pure legal question" presented here "can be addressed now," Plaintiffs' claims are fit for judicial review. *New York II*, 2020 WL 5422959, at *25.

This Court therefore need "not reach the second factor of the prudential ripeness inquiry—hardship to the parties in delaying review." *Oklevueha*, 676 F.3d at 838. But that prong is also met. Just as in the citizenship question litigation, "time is of the essence," and "delayed review would cause hardship to Plaintiffs." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 626 (S.D.N.Y. 2019). The Apportionment Exclusion Order is inflicting the enumeration-based harms discussed above because of its effect of discouraging undocumented immigrants from participating in the census. *See supra* at 6-11. Delaying review would exacerbate this "grave hardship." *New York II*, 2020 WL 5422959, at *24.

Delaying review until after the President excludes undocumented immigrants from the apportionment base would also harm Plaintiffs, and the public interest, by severely impairing redistricting processes in jurisdictions throughout the country. Redistricting deadlines vary from State to State, with some States requiring the process to be completed swiftly. *See*, *e.g.*, Tex. Const. art. III, § 28; Leg. Ref. Lib. of Tex., *Texas Legislative Sessions and Years*," https://lrl.texas.gov/sessions/sessionYears.cfm (last visited Sept. 13, 2020) (requiring Texas legislature to approve State redistricting plan by May 31, 2021).[13] Because apportionment is a "zero sum game," *Alabama v. U.S. Dep't of Commerce*, 396 F. Supp. 3d 1044, 1052 (N.D. Ala. 2019), a definitive order issued late next year (or in 2022) correcting Defendants' flawed

[13] For an overview of the redistricting deadlines in each State, *see generally* Yurij Rudensky et al., *How Changes to the 2020 Census Timeline Will Impact Redistricting* (May 4, 2020), https://www.brennancenter.org/sites/default/files/2020-05/2020_04_RedistrictingMemo.pdf.

apportionment is sure to invite collateral litigation from States that have completed redistricting plans based on the belief that they would receive a greater allocation of seats. There is no reason to risk the inevitable disruption and hardship that would result if review were delayed. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 530 (holding that plaintiffs' claims were prudentially ripe because "[w]aiting for the Government to decide how it wants to apply the Order would only cause more hardship and would not resolve the legal question at issue").

Once again, there is nothing of substance on the other side of the ledger. Defendants argue that current judicial review "would improperly interfere with the Census Bureau's ongoing efforts to determine how to respond to the Presidential Memorandum . . . and could impede the apportionment." Opp. at 7. Of course, a finding that the Apportionment Exclusion Order is unlawful would prevent Defendants from carrying it out. But that would not "impede the apportionment"—it would ensure that the apportionment is properly executed. Defendants' conclusory assertion of hardship does not warrant delay—particularly when weighed against the genuine and "substantial hardship" that "denying prompt judicial review would impose" on Plaintiffs. *See Susan B. Anthony List*, 573 U.S. at 167-68.

III. THE ORDER IS UNCONSTITUTIONAL AND *ULTRA VIRES*

A. The Order Violates the Apportionment and Enumeration Clauses

Plaintiffs' opening brief demonstrated that the constitutional text, original meaning, and unbroken historical practice by all three branches of government establish that undocumented immigrants may not be categorically excluded from the apportionment base. *See* Br. at 14-29. Instead, the Constitution requires counting all "persons" who reside in each State. *See id.*; *see also* Br. of U.S. House of Representatives as Amicus Curiae in Support of Plaintiffs, ECF No. 69 at 4-9; *see generally* Br. of Amici Curiae Historians in Support of Plaintiffs, ECF No. 78.

Defendants' opposition challenges almost none of this. *See* Opp. at 17-30. They do not dispute that the word "persons" as used here includes undocumented immigrants. They embrace the historical understanding that "persons in each State" means all "inhabitants" of a State or all persons who have their "usual residence" or "usual place of abode" within a State. *See* Opp. at 18-21. They do not dispute that those terms have *never* been applied to categorically exclude

undocumented immigrants from the apportionment base. And they do not dispute that all three branches of government—including administrations from both political parties—have on numerous occasions expressly considered and uniformly rejected the unprecedented policy that Defendants have embraced. *See* Br. at 22-27. When recently confronted with this history in a parallel lawsuit, Defendants explicitly conceded that they "have not been able to identify any" support in the "historical record" for their position.[14]

Having conceded nearly everything but the conclusion, Defendants attempt to defend the constitutionality of the Apportionment Exclusion Order on two grounds. First, they argue that the President acted within his statutory discretion because the term "inhabitants" can reasonably be interpreted to exclude persons who reside in a place without permission. Opp. at 21-24. Second, Defendants argue that because Plaintiffs are raising a "facial challenge" to the Order to exclude all undocumented immigrants, Plaintiffs cannot prevail so long as Defendants can constitutionally exclude some undocumented immigrants. *Id.* at 24-30. Both arguments fail.

1. The Constitution Affords No Discretion to Categorically Exclude All Undocumented Immigrants

After acknowledging that "persons in each State" has long been understood to mean "inhabitants" or persons who have their "usual residence" or "usual place of abode" in a State, Defendants abruptly announce that those terms are all "ambiguous," and insist that the President has acted within his statutory "discretion" to "define" them to exclude all undocumented immigrants. Opp. at 18, 21. But any discretion conferred by the Census and Reapportionment Acts cannot save this Order, because traditional tools of constitutional interpretation show that the Constitution forbids the categorical exclusion of undocumented immigrants from the apportionment base.

To begin with, Defendants' argument is refuted by the ordinary meaning of the very terms that they concede are controlling. In 1787, 1868, and today, an "inhabitant" is simply one

[14] Ex. C, *New York II*, Hr'g Tr. at 46 (Sept. 3, 2020).

who "occupies a particular place regularly, routinely, or for a period of time."[15] And then, as now, one's "usual residence" or "usual place of abode" is where one "lives and sleeps most of the time."[16] Those terms do not turn at all on a person's legal status.

For example, consider a family that moves into an abandoned house and lives there for several years. If the neighbors were asked whether the abandoned house has any "inhabitants," the answer would surely be *yes*. Even though the family does not live in the house by legal right, they would nonetheless be considered its "inhabitants" under any ordinary understanding of the word. And the house likewise would be considered the family's "usual residence" or "usual place of abode"; regardless of the legality of their occupancy, the family "lives and sleeps [there] most of the time." So too, the legal status of undocumented immigrants has no bearing on whether they are inhabitants of a State or have their usual residence or abode in a State under any ordinary meaning of these terms.

Defendants make no attempt to reconcile the ordinary meaning of these terms with the wholesale exclusion of undocumented immigrants who eat, sleep, work, and live in a State. Defendants' own list of definitions confirms that the ordinary meaning of "inhabitant" is "a person that resides or ordinarily dwells in a place or home." *See* Opp. at 20 n.5 (citation omitted). The only arguable ambiguity Defendants identify is temporal: how long or how regularly one must reside somewhere to be considered an inhabitant, and conversely how long or frequently one may reside elsewhere before losing inhabitancy. *Franklin* also acknowledged these temporal ambiguities in certain circumstances, such as when a student attends college out of State or when persons "are institutionalized in out-of-state hospitals or jails for short terms." 505 U.S. at 805-06. But the temporal ambiguity of inhabitancy in certain circumstances cannot justify categorical exclusion based solely on legal status.

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[15] Ex. 31, *Inhabitant*, *Merriam-Webster Online Dictionary*, https://www.merriamwebster.com/dictionary/inhabitant (last visited Aug. 26, 2020); *see also* Ex. 32, *Inhabitant*, Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1766) ("Dweller; one that lives or resides in a place.").

[16] Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5,525, 5,526 (Feb. 8, 2018).

In a final effort to support their textual argument, Defendants highlight two stray quotations from Emer de Vattel and James Madison, which describe "inhabitants" residing in a country permissively. Opp. at 28. In context, however, both quotes were merely contrasting permissive "inhabitants" with "subjects" or "citizens." Neither Vattel nor Madison stated that persons are not "inhabitants" unless their residency is lawful.[17] Nor do Defendants provide any evidence that any of the original Framers, any of the drafters of the Fourteenth Amendment, or any member of any State ratifying conventions relied on such a truncated concept of "inhabitant" when drafting or approving the Apportionment Clause of Article I or the Fourteenth Amendment.

To the contrary, the Framers and drafters' intent to use the term in its ordinary, expansive sense is confirmed by the historical record. As Defendants recite, the draft Apportionment Clause included the word "inhabitants" when it was submitted to the Committee of Style, and the Committee changed that language to "whole Number of free persons" without "alter[ing] the meaning" of the draft. Opp. at 18 (citation omitted). But that rendition is incomplete. Defendants leave out the end of the sentence in the draft Apportionment Clause—"the number of inhabitants, *according to the rule hereinafter made for direct taxation*"—and neglect to mention that the Direct Taxation Clause specified "the whole number of free citizens and *inhabitants of every age, sex, and condition*."[18] That sweeping language makes abundantly clear that the Framers intended to capture the broadest meaning of the term "inhabitant." Defendants' artificially circumscribed understanding of "inhabitant" is contrary to Defendants' own understanding of the Apportionment Clause's drafting history.

Defendants protest that we cannot know whether the drafters of the Fourteenth Amendment considered undocumented immigrants to be inhabitants because the first federal immigration laws were not passed until after the Fourteenth Amendment was ratified. *See* Opp. at 26. But numerous state laws *did* prohibit entry by certain persons, and yet those persons were

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[17] *See The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814); Ex. 16, The Federalist No. 54 (James Madison).

[18] Ex. 15, 2 Records of the Federal Convention of 1787 at 566, 571 (M. Farrand ed. 1911) (emphasis added).

not excluded from the census or apportionment count despite their unlawful presence. *See, e.g.*, Act of May 5, 1847, ch. 195, § 3, 1847 N.Y. Laws 182, 184 (requiring inspection of immigrants at ports of entry and barring "infirm persons" from entering). Likewise, escaped slaves in free States were counted as inhabitants of the free State where they resided, even though their presence there was unlawful under the Fugitive Slave Act of 1850.[19]

Defendants also cite isolated snippets from the Fourteenth Amendment ratifying debates, which they claim suggest that the drafters included noncitizen immigrants in the apportionment count only because they assumed that all immigrants were on a five-year path to naturalization. Opp. at 27. That is simply false. Federal law at that time did *not* provide all immigrants "a direct pathway to citizenship." *Id.* In 1866, only white immigrants were eligible.[20] Yet there was no mention of excluding nonwhite immigrants from apportionment, which would have been required if the drafters intended that only immigrants on a "pathway to citizenship" would be counted for apportionment purposes. In context, Defendants' quotes were instead addressing the Fourteenth Amendment's penalization of States that disenfranchised Black men.[21] For example, when Representative Conkling and others remarked on the temporary "political disability of aliens," they were condemning the continued disenfranchisement of former slaves, not proposing the proper basis for understanding apportionment.[22] Indeed, as Defendants acknowledge, the Fourteenth Amendment was not understood to alter apportionment other than by "includ[ing] former slaves." Opp. at 19. Defendants' arguments about the Fourteenth Amendment ratifying history thus fare no better than their claims about the Committee of Style.

Finally, though Defendants take pains to argue otherwise, the lack of any historical precedent for their position confirms its lack of providence. The Supreme Court has repeatedly emphasized the crucial role of historical practice in resolving constitutional questions. *See, e.g.*,

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[19] U.S. Census Bureau, *Population of The United States in 1860* at ix-xii, https://perma.cc/MBR8-AKDU (assessing fluctuations in the fugitive slave population).

[20] Naturalization Law of 1802, ch. 28, 2 Stat. 153 (limiting naturalization to "any alien, being a free white person").

[21] *See* Ex. D, Cong. Globe, 39th Cong., 1st Sess., at 354, 3035 (1866).

[22] *Id.* at 356.

Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016); *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (upholding constitutionality of certain recess appointments based in large part on the "longstanding 'practice of the government'" (citation omitted)). Historical practice informs the court's "determination of what the law is," because, as Madison wrote, certain constitutional provisions "require a regular course of practice to liquidate [and] settle the[ir] meaning." *Noel Canning*, 573 U.S. at 525 (quoting Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)). And the Supreme Court has been particularly emphatic about the role of history in resolving census and apportionment cases. *See, e.g.*, *New York I*, 139 S. Ct. at 2567 (noting its "interpretation of the Constitution is guided by a Government [census] practice that 'has been open, widespread, and unchallenged since the early days of the Republic'" (citation omitted)).[23]

Here, more than two centuries of consistent historical practice and interpretation confirm the plain meaning of the text and its drafting history. *See* Br. at 17-29. In 230 years, no apportionment has ever excluded undocumented immigrants on account of their legal status, and the notion that such exclusion is permissible has been expressly considered and rejected by all three branches of government. *Id.* at 22-27. Often "'the most telling indication of [a] severe constitutional problem' . . . 'is a lack of historical precedent' to support it," and that is undoubtedly the case here. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (citation omitted).[24]

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[23] *See also Wisconsin*, 517 U.S. at 21 (emphasizing "the importance of historical practice in" understanding the Enumeration Clause); *Franklin*, 505 U.S. at 806 (examining the history of the administration of the census to determine whether the Secretary had violated the Enumeration Clause); *Dep't of Commerce v. Montana*, 503 U.S. 442, 464-65 (1992) (examining the historical practice of apportionment under Article I, Section 2 to inform its meaning).

[24] In parallel litigation, Defendants suggested that the unprecedented nature of the Apportionment Exclusion Order is not problematic because *Franklin* likewise broke new historical ground by including military stationed overseas. *See* Ex. C, *New York II*, Hr'g Tr. at 46. But the counting of "overseas servicemen," at issue in *Franklin*, was not anomalous. As the Supreme Court explained, overseas servicemen had been counted in 1900 and then again in 1970 during the Vietnam War. Congress actively debated the matter in 1980 but decided against including them, only to debate and re-incorporate overseas servicemen in 1990. *See Franklin*, 505 U.S. at 792-93. That is nothing like the unbroken 230 year history in this case.

To the extent Defendants address historical practice at all, their arguments rely on inapt analogies and inapposite case law. For example, Defendants emphasize that a person's "physical presence" has never been dispositive for apportionment purposes because tourists and certain diplomats need not be counted in the census. Opp. at 18-21. But those persons are excluded not because of their legal status—indeed, most of them are presumably here legally—but because their *usual place of residence* is not within the United States. No one disputes that such visitors who usually reside in a different country need not be counted as "inhabitants" of the United States, nor that the Census Bureau's usual residence rule permissibly excludes them.[25]

Defendants next emphasize an early twentieth century immigration case, *Kaplan v. Tod*, 267 U.S. 228 (1925). *See* Opp. at 25. But *Kaplan* had nothing to do with the census or apportionment process—it addressed whether an immigration statute authorized the naturalization of an immigrant child. In 1914, Esther Kaplan was denied entry at the border because examiners believed she was "feeble minded" and thus inadmissible under the then-operative immigration laws. *Kaplan*, 267 U.S. at 229. Pending her deportation, Esther was paroled to a charitable organization, which allowed her to live with her father. *Id.* The question was whether Esther had "entered" the United States within the meaning of the statute or rather had remained detained at the border. *Id.* at 230-31. The Court held that although Esther's "prison bounds were enlarged by [her parole]," she legally remained at the border "within the meaning of the Act." *Id*. at 230.

Kaplan's ruling regarding an immigration naturalization statute is irrelevant to whether the Constitution permits the President to exclude all undocumented immigrants from the apportionment count. In fact, genealogists have confirmed that Esther Kaplan *was* in fact counted in the 1920 decennial census during her parole.[26] And she would likewise be counted today under the Census Bureau's standard application of the usual residence rule. *See* Final 2020

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[25] *See* 83 Fed. Reg. at 5,526 n.1, 5,533. The very first Census Act, however, employed an even more expansive rule, requiring that transient people "without a settled place of residence" be reported at whatever location "where he or she shall be on" the census day. Ex. 20, Census Act of 1790 § 5, 1 Stat. 101, 103.

[26] *See* Ex. E, Mendelsohn Decl. Ex. 61 ¶ 3, *New York II*, 2020 WL 5422959, ECF No. 149-2 (Aug. 25, 2020).

Census Residence Criteria and Residence Situations, 83 Fed. Reg. at 5535 (juveniles in correctional facilities, group homes, and residential treatment centers are counted as living at the facility).

In sum, there is zero support for Defendants' argument that the President may constitutionally interpret "persons in each State" to exclude all undocumented immigrants. The ordinary meaning of the text is incompatible with that interpretation, as is the drafting history of Article I and the Fourteenth Amendment. On top of that, all three branches of government have expressly considered this issue and without exception have rejected Defendants' position. The Apportionment Exclusion Order is unconstitutional.

2. Defendants Cannot Prevail by Redefining Plaintiffs' Claims

Defendants argue that because Plaintiffs are challenging the Apportionment Exclusion Order on its face, Plaintiffs must show that the Order is unconstitutional in every possible application. *See* Opp. at 24. In other words, they say, Plaintiffs must show that the President cannot exclude any undocumented person from the census for any reason. Defendants cite no authority for applying the standards for facial challenges to claims that the President has exceeded his constitutional and statutory authority. Indeed, Defendants' argument seeks to turn this case upside down. Plaintiffs have never claimed that the census must *include all* undocumented persons. Instead, they challenge Defendants' announced policy to *exclude all* undocumented persons. To succeed, therefore, Plaintiffs need not prove that the census must include all undocumented persons—just that it must include some of them.

Defendants' contrary position not only misconstrues Plaintiffs' challenge, it also fails as a matter of established doctrine. When evaluating a "facial challenge," courts consider "only applications of the statute in which it actually authorizes or prohibits conduct," not circumstances where "the law is irrelevant." *City of L.A. v. Patel*, 576 U.S. 409, 417-18 (2015). In *Patel*, for example, the Court reviewed a facial challenge under the Fourth Amendment to an ordinance authorizing police to obtain hotel guest records without a warrant or individualized suspicion. *Id.* at 412-13. The City made the same argument there that Defendants make here—namely, that the challenger needed to show that every possible application of the ordinance violated the

Fourth Amendment. *Id.* at 417-18. The Supreme Court rejected that view: It was "irrelevant" that the ordinance could constitutionally be "applied" in certain circumstances when Fourth Amendment exceptions were triggered (*e.g.*, exigency, consent), because in those circumstances the ordinance would "do no work." *Id.* at 417-19.

The same principle controls here. In Defendants' examples where the Order could be "applied constitutionally," such as by excluding foreign tourists or diplomats, the exclusion would be constitutional only if and to the extent those persons already are excludable under accepted understandings of inhabitancy or usual residence or abode. To the extent the Order excludes based on legal immigration status any person who would not have otherwise been excluded by those residency metrics, the Order is unconstitutional.[27] Put differently, the Order is facially unconstitutional because the only independent "work" it does violates the Constitution.

Accepting Defendants' position on facial challenges would also lead to absurd results. Presumably, even Defendants would not argue that an order directing the exclusion of all minors would be immune from facial challenge because some minors can be legitimately excluded. The same must be true here. Immigration status, like age, is an unconstitutional basis for exclusion. *See New York II*, 2020 WL 5422959, at *29 & n.16 (rejecting this facial/as-applied argument).[28]

B. The Order Is *Ultra Vires*

The Order's incompatibility with the Census and Reapportionment Acts is equally clear. The statutes' text, drafting history, and contemporary public meaning make clear that Congress never gave the President power to issue anything like the Order. In addition, the statutes require the President to calculate the apportionment base using the *census tabulation* alone; they do not

[27] Defendants also protest that the Order could be applied constitutionally by excluding from apportionment "illegal aliens detained in a detention facility after being arrested while crossing the border." Opp. at 18; *see also id.* at 25. But if such exclusions were lawful, it would be based on ordinary residency principles, not immigration status.

[28] This argument is not only wrong but also inconsistent. Defendants concede that the Census and Reapportionment Acts mirror the Constitution's requirements for apportionment. Ex. C, *New York II*, Hr'g Tr. at 35. Yet they do not press any facial/as-applied argument in opposition to Plaintiffs' statutory claims—that is, they do not (and cannot) argue that the Order violates the Census and Reapportionment Acts only if every application is a violation.

permit the President to derive the apportionment from a separate dataset. The Order violates the statutes in both of these respects.

1. The President Has No Statutory Authority to Exclude All Undocumented Immigrants

Defendants concede that Congress requires the enumeration of all "persons in each State," and that undocumented immigrants are "persons" within the meaning of this language. Opp. at 31. But Defendants argue that the statutory phrase "persons *in each State*," like its constitutional counterpart, is limited to "inhabitants" or "usual residents," and that ambiguities in those statutory phrases likewise implicitly authorize the President to decide who counts. *Id.* The legislative history squarely forecloses Defendants' position.

Congress enacted Section 2a(a)'s command that the Executive count the "whole number of persons in each state" in 1929. Pub. L. No. 71-13 § 22, codified at 2 U.S.C. § 2a. By that time, Congress had passed numerous laws restricting immigration and was well-acquainted with "the concept of the undocumented or illegal alien." Amicus Br. of Historians at 18-20 (collecting immigration statutes, such as the Chinese Exclusion Act of 1882, Pub. L. No. 47-126, § 14, 22 Stat. 59). Congress was also well aware that undocumented immigrants were included in the apportionment count. *Id.* at 19-22. Yet, at the time of the 1929 enactment, Congress rebuffed every effort to change that policy. It rejected an amendment that would have excluded all "aliens" from the apportionment base, and separately rejected two other amendments that would have required the census director to identify for purposes of the enumeration all "aliens unlawfully in the United States."[29] Indeed, each of those proposed amendments failed by a landslide—roughly 2:1 margins. *See* Amicus Br. of Historians at 20-21.

These amendments failed, just as later attempts to amend the statute would fail, because of the overwhelming consensus that excluding undocumented immigrants would violate the Constitution. The Senate Legislative Counsel opined that there was "no constitutional authority for the enactment of legislation excluding aliens from enumeration," because the command to

[29] Ex. F, 71 Cong. Rec. at 2065; *id.* at 2078-83; *see also id.* at 2065.

count the whole number of persons "has from the beginning been construed to include aliens."[30] This view was shared even by Members of Congress who were politically opposed to including undocumented immigrants. Senator David Reed, for example, explained that he "want[ed] to vote" in favor of an amendment to exclude undocumented immigrants but that he could not because "[e]very Congress that acted on [the apportionment clause] of the original Constitution" had determined that "literally" "every apportionment inhabitant[]" must be included.[31] And Representative Homer Hoch submitted a constitutional amendment to exclude aliens from the enumeration,[32] but he nevertheless refused to support a *legislative* attempt to exclude aliens because such a bill "in [his] own view is unconstitutional."[33] In 1940, the issue was again raised, debated, and rejected on constitutional grounds.[34] During the debates Representative Celler did not mince words: "If you want aliens out, you must amend the Constitution."[35] Similar amendments proposed since then have all likewise failed. *See* Br. at 23-24.

All this goes to show that, regardless of how much discretion the Constitution affords Congress regarding apportionment, Congress never delegated to the President discretion to exclude all undocumented persons. When Congress codified the constitutional requirement to count all "persons in each State," and later Congresses repeatedly rejected proposals to modify that text to exclude undocumented persons, the statutory language they enacted and preserved must be understood as those Congresses understood it—as "turn[ing] solely on residency, without regard for legal status." *New York II*, 2020 WL 5422959, at *30. Even if Congress's view on that issue were debatable as a matter of constitutional interpretation, it would still be controlling as a matter of statutory interpretation because it is Congress's "*understanding* of the constitutional language, not whether their understanding was correct . . . that matters." *Id.* at 30 (citing *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020)).

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[30] Ex. 23, 71 Cong. Rec. at 1822.

[31] Ex. F, 71 Cong. Rec. at 1958.

[32] *See* Ex. G, H.J. Res. 351, 71st Cong. (1929).

[33] Ex. F, 70 Cong. Rec. at 1592.

[34] *See* Ex. 25, 86 Cong. Rec. 4371-75.

[35] *Id.* at 4372.

Defendants argue that, regardless of Congress's intentions, the President has unilateral authority to make his own "policy judgments" about who does or does not qualify as an "inhabitant" or "resident." Opp. at 32. Defendants cite *Franklin* in support of this claimed discretion, but *Franklin* offers them no help on this point. While the Supreme Court recognized the President's discretion under Section 2a to take extra measures to count all people who "retained ties to their state," 505 U.S. at 806,[36] it never suggested that the President may exclude people who *have* retained ties to their State based solely on their legal status. Because Congress understood the enumeration of undocumented immigrants to be constitutionally required, it cannot be deemed to have silently conferred to the President discretion to violate that requirement. *See New York II*, 2020 WL 5422959, at *31.

2. The President Cannot Base the Apportionment on Data Other than the Census Numbers

The Order is also unlawful for the independent reason that it mandates apportionment based on something other than the "decennial census of the population" and calculated by something other than a mechanical application of the mathematical "method of equal proportions." 2 U.S.C. § 2a(a). The Census Act requires the Secretary to give the President a single set of numbers—the "tabulation of total population by States"—and requires this set of numbers to be tabulated "under" the "decennial census."[37] In turn, the Reapportionment Act "expressly require[s] the President to use . . . the data from the 'decennial census'" in calculating apportionment—a calculation that is purely "ministerial." *Franklin*, 505 U.S. at 797, 799.

The Order flouts these requirements by directing the Secretary to give the President "two numbers"—one based on the census itself and another based on a post-hoc alteration of the census number to exclude undocumented immigrants. Opp. at 32. That is not a single

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[36] *See also Utah v. Evans*, 536 U.S. 452, 457 (2002) (authorizing use of hot-deck imputation to account for hard-to-count residents); 83 Fed. Reg. at 5,534 (counting college students who are away for the academic year as residents of their home State); *id.* at 5,535 (counting prisoners in out-of-state jails as residents of their home State).

[37] Section 141(a) requires the Secretary to conduct the "decennial census of population," and subsection (b) then requires the Secretary to report to the President "[t]he tabulation of total population by States under subsection (a) of this section"—that is, under the "decennial census"—"as required for the apportionment of Representatives in Congress."

"tabulation" as mandated by the Census Act. The Order also unlawfully provides that the President's apportionment calculation will be based on the second number rather than on the "census of the population," thus violating the Reapportionment Act.

Defendants maintain that the President is free to rely on numbers other than the census tabulation because *Franklin* held that "§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'" Opp. at 32 (quoting 505 U.S. at 799). But *Franklin* merely confirmed the President's ability to set the procedures for creating the *census tabulation itself*. Neither the text of Section 2a nor *Franklin* gives the President authority to manipulate the census tabulation after-the-fact or to base his "admittedly ministerial" apportionment calculations on such a manipulation. *See Franklin*, 505 U.S. at 797 ("Section 2a . . . expressly require[s] the President to use . . . the data from the 'decennial census.'"); Opp. at 31 (acknowledging that the apportionment calculation itself is "admittedly ministerial"). Indeed, the Department of Justice acknowledged in *Franklin* that the President lacks any such authority. Oral Arg. Tr. at 12, *Franklin v. Massachusetts*, 505 U.S. 788 (No. 91-1502) ("The law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives" and "[i]t would be unlawful . . . just to say, these are the figures, they are right, but I am going to submit a different statement.").[38]

The Census Bureau's reliance on administrative supplementation when conducting the census—such as data from personnel records in *Franklin* or statistical imputation in *Utah*—does nothing to change the unlawfulness of the Order. *Contra* Opp. at 33. Those supplementation techniques have long been used "as part of the census itself," but they have never involved unilateral alterations made by the President after the Secretary reported the final census tabulation under Section 141. *New York II*, 2020 WL 5422959, at *28 n.15 (describing *Franklin*); *see also Utah*, 536 U.S. 452, 457-58 (2002). The Order's attempt to sever the

[38] The legislative record likewise confirms that the President's apportionment calculation must be based on the "census figures" and application of "a purely ministerial and mathematical formula" alone. Ex. H, S. Rep. No. 71-2, at 4 (1929); *accord New York II*, 2020 WL 5422959, at *26-27 (cataloguing the legislative history).

connection between apportionment and the census therefore stands in marked contrast to the government's use of administrative records in *Franklin* and *Utah*. By authorizing the President to "choose" any numbers he wants to "plug into the 'method of equal proportions,'" Opp. at 32, the Order takes the unprecedented step of "giv[ing] the party controlling [the Executive Branch] the power to distort representation in its own favor," *U.S. House of Reps.*, 525 U.S. at 348 (Scalia, J., concurring in part)—a result prohibited by both the Constitution and Congress.

C. The Order Violates the Separation of Powers

Finally, the Apportionment Exclusion Order violates separation of powers principles. Defendants essentially concede that if Plaintiffs' *ultra vires* claim succeeds, the separation of powers claim does, as well. Opp. at 30-31 (contesting both claims together). Because the President's unilateral action to exclude undocumented immigrants from the apportionment base is "incompatible" with Congress's will as expressed in the Census and the Reapportionment Acts, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), the President has failed his duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Order thus violates the Constitution's separation of powers, and should be enjoined for this additional reason.

IV. THE COURT SHOULD GRANT PLAINTIFFS' REQUESTED RELIEF

A. Declaratory Relief Is Proper

Defendants do not contest that courts may declare that the Order itself is unlawful. They assert, however, that this Court cannot declare that "any statement from the President to the Congress under 2 U.S.C. § 2a(a) that excludes undocumented persons . . . is null and void," because the "D.C. Circuit . . . has determined that 'declaratory relief' against the President for his non-ministerial conduct 'is unavailable.'" Opp. at 35 (citing *Newdow v. Roberts*, 603 F.3d 1002, 1012-13 (D.C. Cir. 2010)). That is incorrect. Aside from not being controlling authority, *Newdow* did not hold that declaratory relief is never available against the President—who was not even a defendant in that case. In *Newdow*, plaintiffs sued the Chief Justice of the United States and others involved in the inauguration of President-elect Obama, seeking declaratory relief and a preliminary injunction barring the use of religious elements in the ceremony. 603

F.3d at 1006-07. After the ceremony, the D.C. Circuit held that plaintiffs' requested relief—"injunctive or declaratory relief against all possible President-elects and the President himself"—was "unavailable." *Id.* at 1013. Here, by contrast, the President *is* a Defendant, Plaintiffs are *not* seeking injunctive relief against him (or future Presidents), and the question relates to powers vested by the Constitution in *Congress*, not the *President*. Moreover, courts, including the D.C. Circuit, have in fact issued declaratory relief against the President. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018) (distinguishing *Newdow* and noting that "the D.C. Circuit has *itself* submitted the President to declaratory relief" (citing *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974))), *aff'd*, 924 F.3d 602 (D.C. Cir. 2019); *see also New York II*, 2020 WL 5422959, at *35.[39]

B. A Permanent Injunction Is Warranted

A permanent injunction is warranted when plaintiffs have (1) suffered at least one irreparable injury that (2) cannot be compensated through remedies available at law, such as damages, and (3) an injunction would not unduly harm the opposing parties' interests or the public interest. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Nken*, 556 U.S. at 435 (noting that the interests of the public and of the opposing party "merge when the Government is the opposing party"). Those factors are all satisfied here.

1. Plaintiffs' Injuries Are Irreparable and Cannot be Compensated by Damages

Plaintiffs easily satisfy the first two criteria for obtaining an injunction. The record establishes that Plaintiffs suffer two types of serious and irreparable injuries. *First*, Plaintiffs are sustaining current and ongoing enumeration-related injuries stemming from the Order's *present*

[39] Defendants also argue that the California Plaintiffs' request for injunctive and mandamus relief against the President in their First Amended Complaint should be dismissed. Opp. at 34. The Court need not consider this issue because Plaintiffs have not requested injunctive or mandamus relief against the President in their motions for partial summary judgment. *See* Pls.' Mots. at i-ii. Moreover, because Defendants seek dismissal of a remedy rather than a claim, their request is improper in a motion to dismiss. *See Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003) ("[A] Rule 12(b)(6) motion 'will not be granted merely because a plaintiff requests a remedy to which he or she is not entitled.'" (citation omitted)); *Doe v. DOJ*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) ("It need not appear that the plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted.").

chilling effect on census response. Defendants do not contest that a chilling effect on the enumeration would irreparably harm Plaintiffs in the form of reduced federal funding. Instead, they repeat their justiciability arguments, asserting that the Order's chilling effect is either "hypothetical" or "caused by [] independent actors." Opp. at 38-39. Those arguments are meritless for the reasons discussed above. *Supra* at 6-11. Defendants also argue that an undercount is unlikely because the Census Bureau has "protocols" in place to avoid undercounting immigrants. Opp. at 38. But Defendants admit in the very same paragraph that none of those pre-existing protocols has been adjusted to account for the *additional* chilling effects caused by Order. *See id*. (stating that the Order has no effect on "how the Census Bureau is conducting its [] enumeration operations"). Finally, Defendants suggest that "transmission of a general policy message" cannot give rise to irreparable harm as a matter of law. That assertion is contrary to the Supreme Court's decision in *New York I*, which held that fears and other "predictable effect[s] of government action" are cognizable harms. 139 S. Ct. at 2566.

Second, absent injunctive relief the individual and government Plaintiffs will sustain an imminent apportionment injury, because enforcement of the Order would deprive Individual Plaintiffs and the State of California of one or more Representatives and Electors. Defendants argue that the apportionment injuries are merely "hypothetical" because the Secretary might not actually do what the Order requires. Opp. at 37. That argument, again, is entirely derivative of Defendants' justiciability objections, and fails for the same reasons. *See supra* at 3-6. Defendants also contend that the apportionment injury is "not irreparable" because it can be "remedied after the fact" by reapportionment. Opp. at 37. But that misses the point. Plaintiffs' injury from an inaccurate apportionment has no legal remedy; it can be remedied only by an injunction. Whether such an injunction is warranted now is a question of ripeness, not a question of irreparable injury, and ripeness is satisfied here. Indeed, postponing injunctive relief on apportionment would significantly disrupt Plaintiffs' redistricting processes and federal-funding applications, *see supra* at 13-14, and the administrative costs that Plaintiffs would incur in the

aftermath of such a disruption would be extensive, far-reaching, and irredressable (because monetary damages are not available against the federal government).[40]

2. The Equities and Public Interest Favor an Injunction

Neither the government's interest nor the public interest is served by "the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). To the contrary, both the government and the public have a strong interest in the census being conducted lawfully, because the "integrity" of the apportionment process is a "matter of national importance." *New York*, 351 F. Supp. 3d at 517. Defendants urge this Court to look beyond "the merits alone" in deciding whether to issue an injunction, Opp. at 42, but they cannot articulate any way in which the requested injunction would undermine their lawful census activities, *see id.* at 10 (stating that the Order will not "change the conduct of the census"). Accordingly, the equities—like the merits and the nature of the harm—strongly support an injunction.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in the San Jose Plaintiffs' favor on the First and Third Claims for Relief and in the California Plaintiffs' favor on the First, Second, and Third Claims for Relief, and should award the relief requested.

[40] Purely financial or administrative injuries can constitute irreparable harm where, as here, "expenditures cannot be recouped" because the federal government is immune from damages suits. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1304 (2010); *accord Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (invoking this rule in the context of a suit against a government agency).

Dated: September 21, 2020

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CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Donald J. Trump, et al.** No. **5:20-cv-05169-LHK-RRC-EMC**

I hereby certify that on September 21, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 21, 2020, at Sacramento, California.

Eileen A. Ennis	*/s/ Eileen A. Ennis*
Declarant	Signature

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