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20  
 21 IN THE UNITED STATES DISTRICT COURT  
 22 FOR THE NORTHERN DISTRICT OF CALIFORNIA

23 CITY OF SAN JOSE, CALIFORNIA, *et al.*,

24 Plaintiff,

25 v.

26 DONALD J. TRUMP, *et al.*,

27 Defendants.

**REPLY IN SUPPORT OF DEFENDANTS'  
 MOTION TO DISMISS**

28 STATE OF CALIFORNIA, *et al.*,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

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

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## INTRODUCTION

1  
2 Plaintiffs in this lawsuit seek to challenge the implementation of the Presidential  
3 Memorandum, even though the Government has not yet determined the extent to which illegal  
4 aliens can be excluded from the apportionment base and, therefore, the extent to which the  
5 Presidential Memorandum can be implemented. As Defendants explain at length in their opening  
6 brief, this premature challenge simply is not appropriate for adjudication by this Court under long-  
7 established principles of ripeness and Article III standing. There will be a time for Plaintiffs to  
8 bring their challenge; now is not it. Until the Presidential Memorandum is actually implemented,  
9 this Court should decline Plaintiffs' invitation to engage in speculation and hypotheticals.

10 Even if Plaintiffs were able to demonstrate that jurisdictional and prudential concerns  
11 counseled in favor of considering their challenge now, Plaintiffs have not stated any claim entitling  
12 them to relief. Plaintiffs assert that the Presidential Memorandum violates the Apportionment  
13 Clause, is *ultra vires*, and fails to comply with constitutional separation of powers. In so arguing,  
14 however, Plaintiffs disregard entirely the fact that Congress delegated to the President the discretion  
15 to determine who constitutes an "inhabitant" for purposes of apportionment.

16 Finally, Plaintiffs offer scant justification for the extraordinary relief they request. As  
17 Defendants have explained—and as Plaintiffs fail to rebut—declaratory relief is simply not an  
18 available remedy against the President of the United States. Indeed, the precedent Plaintiffs rely  
19 on to argue otherwise counsels against issuing declaratory relief in this case. Nor may Plaintiffs  
20 enjoin the Memorandum's implementation. Aside from failing to demonstrate imminent and  
21 irreparable harm, Plaintiffs once again offer no argument in support of the remaining injunction  
22 factors other than to assert that they should prevail on the merits. Plaintiffs therefore fall well short  
23 of demonstrating entitlement to a permanent injunction.

## ARGUMENT

### I. The Court Lacks Jurisdiction Because Plaintiffs' Claims Are Unripe.

24  
25  
26 A claim is unripe "if it rests upon contingent future events that may not occur as anticipated,  
27 or indeed may not occur at all." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir.  
28 2002) (citation omitted). But Plaintiffs' apportionment claims are premised entirely on a

1 “contingent future event[] that may not occur as anticipated.” As Defendants have explained,  
 2 “[b]ecause it is not known what the Secretary may ultimately transmit to the President, it is  
 3 necessarily not yet known whether the President will be able to exclude any, some, or all illegal  
 4 aliens from the apportionment base.” Defs.’ Notice of Mot. and Mot to Dismiss, or in the  
 5 alternative, Mot. for Partial Summ. J., (“Def. Mem.”) at 7, Cal. ECF No. 61.

6 With respect to supposed apportionment injuries, the Southern District of New York panel  
 7 entertaining parallel litigation got it right. “[A]s of today,” that court explained, “it is not known  
 8 whether that harm will come to pass, as the Secretary has not yet determined how he will calculate  
 9 the number of illegal aliens in each State or even whether it is ‘feasible’ to do so at all.” *New York*  
 10 *v. Trump*, No. 20–cv–5770, -- F. Supp. 3d --, 2020 WL 5422959, at \*15 (S.D.N.Y. Sept. 10, 2020),  
 11 *appeal filed*, No. 20–366 (S. Ct. docketed Sept. 22, 2020) (“*New York*”).<sup>1</sup> And “[i]n the absence  
 12 of that information,” the *New York* plaintiffs’ supposed apportionment harm “is likely ‘too  
 13 speculative for Article III purposes.’” *Id.* (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398,  
 14 409 (2013)). As Defendants have explained, Plaintiffs’ apportionment claims here are thus unripe  
 15 as they depend upon contingent future events that may not occur as anticipated or may never occur  
 16 at all. *See* Def. Mem. at 7 (citing *Mont. Env’t Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1190  
 17 (9th Cir. 2014)).

18 Plaintiffs’ attempt to analogize this case to *City and County of San Francisco v. Trump*, 897  
 19 F.3d 1225 (9th Cir. 2018), likewise fails. *See* Pls.’ Reply in Supp. of Mot. for Partial Summ. J. and  
 20 in Opp’n to Defs.’ Mot. to Dismiss, or in the Alternative, Mot. for Partial Summ. J., (“Pl. Opp.”) at  
 21 3–4, Cal. ECF No. 62. That case concerned an executive order that limited the federal  
 22 government’s potential action to that “consistent with law.” *San Francisco*, 897 F.3d at 1232–33.  
 23 The court held that those three words did not rescue the order’s constitutionality. *San Francisco*  
 24 was wrongly decided, *see generally id.* at 1245–50 (Fernandez, J., dissenting), but even assuming,  
 25 *arguendo*, that *San Francisco* bound this three-judge court, it only supports Defendants here. “The

26 <sup>1</sup> To be sure, the *New York* panel got much wrong. The Jurisdictional Statement that Defendants  
 27 filed in their Supreme Court appeal to the *New York* decision is available at  
 28 [https://www.supremecourt.gov/DocketPDF/20/20-366/154588/20200922095815714\\_Trump%20v.%20New%20York%20Jurisdictional%20Stateme  
 nt%20a.pdf](https://www.supremecourt.gov/DocketPDF/20/20-366/154588/20200922095815714_Trump%20v.%20New%20York%20Jurisdictional%20Statement%20a.pdf).

1 interpretation of” the Memorandum “begins with its text, which must be construed consistently  
 2 with [its] object and policy.” *Id.* at 1238 (citations omitted). Here, the Memorandum—in no fewer  
 3 than four places—expressly conditions its implementation of the stated policy: (i) to the extent  
 4 feasible; (ii) to the extent practicable; (iii) to the extent afforded by the President’s discretion; and  
 5 (iv) only as consistent with applicable law:

- 6 • “[I]t is the policy of the United States to exclude from the apportionment base aliens who  
 7 are not in a lawful immigration status . . . *to the maximum extent feasible and consistent*  
 8 *with the discretion delegated to the executive branch.*”
- 9 • “I have accordingly determined that respect for the law and protection of the integrity of the  
 10 democratic process warrant the exclusion of illegal aliens from the apportionment base, *to*  
 11 *the extent feasible and to the maximum extent of the President’s discretion under the law.*”
- 12 • “[T]he Secretary shall take all appropriate action, *consistent with the Constitution and other*  
 13 *applicable law*, to provide information permitting the President, *to the extent practicable*,  
 14 to exercise the President’s discretion to carry out the policy set forth in . . . this  
 15 memorandum.”
- 16 • “This memorandum shall be implemented *consistent with applicable law . . .*”

17 Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg.  
 18 44,679, 44,680 (July 21, 2020) (emphases added). These express, repeated conditions—three of  
 19 which are made in the same breath as the statement of policy and the directive—are a far cry from  
 20 the three words at issue in *San Francisco*. See 897 F.3d at 1239. The Memorandum’s “text,”  
 21 “object,” and “policy,” *id.* at 1238, are thus all fully aligned.

22 Plaintiffs’ other arguments fare no better. Plaintiffs admit—as they must—that  
 23 apportionment challenges are traditionally brought *after* an apportionment determination has been  
 24 made. See Pl. Opp. at 5; Def. Mem. at 8. Instead of identifying a case to the contrary, Plaintiffs  
 25 cite *Department of Commerce v. U.S. House of Representatives* to argue that “Plaintiffs do not need  
 26 to prove their apportionment harms have already occurred to satisfy Article III; they need only  
 27 show a ‘substantial risk’ that these harms will occur.” Pl. Opp. at 5–6. But *House of*  
 28 *Representatives* concerned enumeration *procedures*. Here, however, Plaintiffs are *not* challenging



1 the enumeration procedures themselves. In fact, in that respect *House of Representatives* only  
2 further demonstrates that this action is not ripe: The district court in that case explained that “[t]he  
3 matter . . . becomes ripe at . . . the point at which it is *certain* that the Bureau will employ statistical  
4 sampling in conducting the apportionment enumeration.” *U.S. House of Representatives v. U.S.*  
5 *Dep’t of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998) (emphasis added), *appeal dismissed*, 525  
6 U.S. 316 (1999). There, “[t]hat time [was] now.” *Id.* Here, by contrast, that time is *not* now,  
7 because it is far from “certain” what methodology or methodologies the Census Bureau might  
8 employ to implement the Memorandum.

9 Plaintiffs also argue that Defendants’ motion for a stay of judgment pending appeal in the  
10 *New York* litigation somehow undermines Defendants’ justiciability arguments. Pl. Opp. at 4–5.  
11 It does not. As Defendants have made clear in that litigation, the *New York* judgment will impose  
12 an irreparable harm if it prevents the Secretary from sending a report to the President in accordance  
13 with the policy judgment set forth in the Memorandum. That does not mean that the plaintiffs’  
14 challenge there was presently justiciable—indeed, Defendants have consistently argued it is not.

15 Finally, Plaintiffs’ prudential-ripeness arguments are not credible. Plaintiffs claim that their  
16 challenge is “purely legal” in nature. Pl. Opp. at 12. In fact, the legal analysis may differ based on  
17 what subsets of illegal aliens are, in fact, excluded because the Secretary has deemed it feasible,  
18 and the President has determined that it is practicable and within his discretion. Waiting until after  
19 the Census Bureau completes its ongoing process and determines how it may implement the  
20 Memorandum would patently “advance” the Court’s “ability to deal with the legal issues presented.”  
21 *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003). Plaintiffs also argue that  
22 “[d]elaying review” would “severely impair[]” the “redistricting process in jurisdictions throughout  
23 the country” and would “risk . . . inevitable disruption and hardship.” Pl. Opp. at 13–14. But the  
24 Supreme Court has disagreed. *Utah v. Evans*, 536 U.S. 452, 463 (2002) (“Should the new report  
25 contain a different conclusion about the relative populations of North Carolina and Utah, the  
26 relevant calculations and consequent apportionment-related steps would be purely mechanical; and  
27 several months would remain prior to the first post–2000 census congressional election.”).  
28 Plaintiffs similarly claim that later review would harm “the public interest,” Pl. Opp. at 13, but even

1 if that contention were accurate, amorphous harm to others not before the Court is entirely irrelevant.  
 2 *See Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007) (“the prudential  
 3 standing doctrine typically prevents us from hearing lawsuits on the basis of injuries to non-  
 4 parties”). And Plaintiffs’ reassurance that a preemptive decision on apportionment would not  
 5 impede apportionment because “it would ensure that the apportionment is properly executed” begs  
 6 the question. Pl. Opp. at 14. If the President’s ultimate decision proves lawful, Plaintiffs’ attempt  
 7 to eliminate his discretion to make it in the first place will have indeed “impede[d] the  
 8 apportionment.” Def. Mem. at 7.

## 9 **II. The Court Lacks Jurisdiction Because Plaintiffs Lack Standing.**

10 Plaintiffs lack standing to challenge the President’s apportionment decision for the same  
 11 reasons Plaintiffs’ challenge is unripe: their alleged apportionment injuries are speculative and  
 12 conclusory, and there is no “substantial risk” that such harm will occur. *See Susan B. Anthony List*  
 13 *v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs’ claim that they are “‘highly likely’ . . . to lose at  
 14 least one seat in the House of Representatives,” Pl. Opp. at 3, is likewise speculative because it is  
 15 an assumption based on numbers yet to be determined and a decision yet to be made. It simply  
 16 cannot support standing. *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992).

17 Lacking a sufficiently imminent apportionment injury to support standing, Plaintiffs  
 18 contend that the Presidential Memorandum “is causing them *present* injuries by discouraging  
 19 undocumented persons and those with whom they live from participating in the census.” Pl. Opp.  
 20 at 6. Defendants have explained why such an injury is speculative in the extreme, *see* Def. Mem.  
 21 at 10–13, and Plaintiffs offer no persuasive arguments in response.

### 22 **A. Plaintiffs Fail to Demonstrate Injury.**

23 While Plaintiffs claim to have offered “detailed evidence that the [Memorandum] is causing  
 24 widespread fear that participation in the census will lead to adverse immigration consequences,”  
 25 Pl. Opp. at 7, they have done nothing to show that a supposed “chilling effect” stemming from the  
 26 Memorandum is anything other than conjecture. Plaintiffs point to the declaration of BAJI’s  
 27 Executive Director as “provid[ing] detailed evidence that the” Memorandum “is causing  
 28 widespread fear that participation in the census will lead to adverse immigration consequences.”

1 *Id.* Apart from positing, in wholly conclusory fashion, that the Memorandum “discourages”  
 2 immigrants from responding to the census, Gyamfi Decl. ¶ 11, San Jose ECF No. 63-4, that  
 3 declaration simply states that BAJI members “have expressed hesitation about participating in the  
 4 2020 Census” in *general*. *Id.* ¶ 15. Nothing in that declaration supports the proposition that the  
 5 *Memorandum* will have a chilling effect, let alone a substantial chilling effect that could materially  
 6 degrade the census. And it speaks volumes that—out of the millions of illegal aliens present in the  
 7 United States—Plaintiffs cannot identify one illegal alien (or even recount a specific conversation  
 8 with an illegal alien) who has been “chilled” by the Memorandum.

9 Plaintiffs continue to rely on the opinion of their expert, Matthew Barreto. *See* Pl. Opp. at  
 10 6–11. But as Defendants have noted, Dr. Barreto cannot explain away the “major finding of the  
 11 2019 Census Test was that there was no statistically significant difference in overall self-response  
 12 rates between treatments.” *2019 Census Test Report*, Census Bureau (Jan. 3, 2020) at ix,  
 13 [https://www2.census.gov/programssurveys/decennial/2020/program-management/census-](https://www2.census.gov/programssurveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf)  
 14 [tests/2019/2019-census-test-report.pdf](https://www2.census.gov/programssurveys/decennial/2020/program-management/census-tests/2019/2019-census-test-report.pdf) (Census Report); *see* Def. Mem. at 11.<sup>2</sup> Plaintiffs accuse  
 15 Defendants of “artful characterization” in referencing the “overall” response rate, Pl. Opp. at 9, but  
 16 it is the Census Report itself that describes it as such. And, as the Census Bureau’s Chief Scientist,  
 17 Dr. John Abowd, has made clear, Dr. Barreto’s efforts to parse variations in response rates among  
 18 communities is flawed because it assumes that “statistically significant self-response  
 19 differentials . . . would persist after [non-response follow-ups] that resolved the status of at least  
 20 99% of all [individuals] in the 2020 Census workload.” Abowd Decl. ¶ 24, Cal. ECF No. 61-1.  
 21 That is to say, the actual implementation of the census, unlike the test, would effectively eliminate  
 22 the variation on which Dr. Barreto focuses. Furthermore, as the Census Report notes, lower  
 23 response rates may very well have been due to the fact that “2019 Census Test did not provide the  
 24 same level of language support that will be available in the 2020 Census,” *not* the presence of a  
 25 citizenship question. Census Report at 13.

26  
 27  
 28 <sup>2</sup> Defendants never claimed that Dr. Barreto failed to consider the report, as Plaintiffs suggest, *see*  
 Pl. Opp. at 6, but instead that he “fail[ed] to consider the *results*,” Def. Mem. at 11 (emphasis  
 added).

1 Disagreements about the results of report, however, are entirely beside the point because it  
2 addressed the now-abandoned citizenship question—not the Memorandum. Dr. Barreto ignores  
3 this crucial fact, suggesting that the “2019 study confirmed . . . that an environment which increases  
4 threat to non-citizens results in lower response rates on the Census.” Barreto Decl. ¶ 27. But that  
5 simply begs the question whether the Memorandum creates “an environment which increases [a]  
6 threat to non-citizens.” Dr. Barreto opines that the Presidential Memorandum will have an even  
7 greater impact on response rates than the citizenship question would have because it “involves more  
8 direct targeting of undocumented immigrants than did the 2019 Census Test.” *Id.* ¶ 53. But such  
9 speculation is devoid of any foundation.

10 Finally, Plaintiffs’ reliance on *Department of Commerce v. New York*, 139 S. Ct. 2551  
11 (2019), and *National Urban League v. Ross*, No. 20-v-05799, ECF No. 96 (N.D. Cal. Sept. 10,  
12 2020), *see* Pl. Opp. at 7, is off point. Unlike Plaintiffs’ challenge here, both of those cases  
13 concerned challenges to enumeration procedures.

#### 14 **B. Plaintiffs Fail to Demonstrate Traceability and Redressability.**

15 As to traceability, Plaintiffs argue that the Supreme Court’s decision in *Department of*  
16 *Commerce v. New York*, 139 S. Ct. 2551 (2019), relieves them of any obligation to show that an  
17 alleged lack of responsiveness to the census is traceable to the Presidential Memorandum. *See* Pl.  
18 Opp. at 10–11. Once again, the materially different facts of this case—and the government action  
19 at issue—distinguish this case from the prior citizenship-question litigation. In that litigation, the  
20 plaintiffs “met their burden of showing that third parties will likely react in predictable ways to the  
21 citizenship question” and the Supreme Court thus upheld standing based “on the predictable effect  
22 of *Government action* on the decisions of third parties.” *Dep’t of Commerce v. New York*, 139 S.  
23 Ct. at 2566 (emphasis added). Here, however, “[t]he Memorandum is not itself directed at census  
24 respondents and appears, even in Plaintiffs’ telling, to be filtered to them through third-party  
25 intermediary sources.” Def. Mem. at 15. Accordingly, unlike in the citizenship-question litigation,  
26 Plaintiffs’ traceability argument here is based on the effect of *third-party* action on the decisions of  
27 *other third parties*. Taken to its logical conclusion, Plaintiffs’ theory is that traceability can be  
28 satisfied solely on the basis of misinformation generated by third parties, and potentially filtered

1 through others—the very definition of rumor. If that were the case, a plaintiff could challenge  
2 nearly any government action so long as it demonstrated that third parties misrepresented its effect.  
3 That cannot be the law.

4 As to redressability, Plaintiffs argue that “a ruling from this Court prohibiting Defendants  
5 from excluding undocumented immigrants would mitigate the” Memorandum’s supposed “chilling  
6 effect.” Pl. Opp. at 11. Plaintiffs are wrong. Insofar as anyone has been chilled from participating  
7 in the census by the Memorandum—notwithstanding that the Memorandum in no way penalizes  
8 participation—it is implausible that relief from this Court would be likely to eliminate that chill.  
9 The President has made clear that he “intends to vindicate [his] policy determination before the  
10 Supreme Court” on appeal and then “implement [that] policy decision.” The White House,  
11 Statement from the Press Secretary (Sept. 18, 2020), <https://go.usa.gov/xGQh2>. It is implausible  
12 that a material number of otherwise-chilled persons are likely to become un-chilled by a district  
13 court decision subject to a realistic prospect of appellate reversal. *See Lujan*, 504 U.S. at 566  
14 (“Standing is not an ingenious academic exercise in the conceivable.”) (citation omitted).

15 Plaintiffs point to Dr. Barreto’s declaration to support their redressability theory, but Dr.  
16 Barreto only proves Defendants’ point. Dr. Barreto opines that “[w]hen [immigrant communities]  
17 believe the threat [*i.e.*, concern about their citizenship status] is real, they will withdraw from the  
18 Census, and when that threat has been removed, they reengage.” Barreto Decl. ¶ 82; *cf.* Gyamfi  
19 Decl. ¶ 11 (contending that the Memorandum “discourages immigrants from responding to the  
20 ongoing 2020 Census because of fear that the government will identify and retaliate against them”).  
21 To the extent that members of immigrant communities believe that the Memorandum poses such a  
22 “threat,” no order from this Court can “remove[]” that “threat” because it is subject to possible  
23 appellate reversal. Indeed, as the President has recently publicized, Defendants have already  
24 appealed another such order to the Supreme Court, so the possibility of appellate reversal is now  
25 concrete.

26 Finally, any chilling effect will no longer exist once census field operations have ended; yet  
27 the Secretary’s report containing the requested information will not be completed until long after  
28 that time. Accordingly, by the time any relief this Court could issue against that report would have

1 coercive legal effect, the injury it is supposed to redress will no longer exist. That is the very  
2 definition of non-redressability.<sup>3</sup>

3 **III. Plaintiffs Fail to State a Claim.**

4 Were this Court to reach the merits, Plaintiffs offer no persuasive arguments demonstrating  
5 that the Memorandum violates the Apportionment Clause, or that in issuing it, the President acted  
6 *ultra vires* or in violation of constitutional separation of powers. Assuming *arguendo* that this  
7 Court has subject-matter jurisdiction, Plaintiffs' complaint should therefore be dismissed for failure  
8 to state a claim.

9 **A. Plaintiffs Fail to State an Apportionment Clause Claim.**

10 On its face, the Memorandum seeks to exclude illegal aliens only to the "extent feasible and  
11 consistent with the discretion delegated to the executive branch." 85 Fed. Reg. at 44,680. *See*  
12 *generally supra* Part I (discussing the Memorandum's various conditions). Having rushed to court  
13 before the Secretary has determined any "feasible" population to exclude—much less before any  
14 numbers have been reported by the Census Bureau, the Secretary, or the President—Plaintiffs  
15 cannot succeed simply by showing that apportionment "must include some" illegal aliens. Pl. Opp.  
16 at 21. To the contrary, "a plaintiff can only succeed in a facial challenge by establishing that no set  
17 of circumstances exists under which the [law] would be valid, *i.e.*, that the law is unconstitutional  
18 in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449  
19 (2008) (edits and citations omitted). In fact, the Supreme Court has specifically explained that  
20 courts "must be careful not to go beyond the [law's] facial requirements and speculate about  
21 'hypothetical' or 'imaginary' cases" when "determining whether a law is facially invalid." *Id.* at  
22 449–50. That is exactly what Plaintiffs improperly seek here: an advisory opinion about  
23 "hypothetical" and "imaginary" exclusions (like all illegal aliens "who eat, sleep, work, and live in  
24 a State," Pl. Opp. at 16) that may not be "feasible" to implement.

25  
26  
27 \_\_\_\_\_  
28 <sup>3</sup> Plaintiffs do not dispute that, owing to Article II's supervisory powers and the Opinions Clause,  
they "cannot preclude the President from obtaining information from the Secretary, nor the  
Secretary from providing it." Def. Mem. at 32–33.

1 With that proper analytical framework applied, Plaintiffs cannot succeed on their facial  
 2 Apportionment Clause claim.<sup>4</sup> *See id.* at 15 (arguing that “the Constitution forbids the *categorical*  
 3 exclusion of undocumented immigrants from the apportionment base” (emphasis added)).  
 4 Plaintiffs themselves tacitly concede as much. They recognize, for example, that if “illegal aliens  
 5 detained in a detention facility after being arrested while crossing the border” can be lawfully  
 6 excluded, then “it would be based on ordinary residency principles, not immigration status.” *Id.* at  
 7 22 n.27. But that is exactly the point. As Defendants already explained, any (as-yet-unknown)  
 8 exclusion of illegal aliens under the Memorandum is due to their lack of “inhabitation” or “usual  
 9 residence” in the United States—concepts that may encompass the consideration of whether an  
 10 alien is permitted to settle in the country or subject to removal by the government. Def. Mem. at  
 11 21–24. That is also true, as another example, if the Secretary found it feasible to exclude aliens  
 12 with final orders of removal. *See id.* at 25. In that circumstance, the government has conclusively  
 13 determined that those aliens must be removed from the country, thus severing their “required tie to  
 14 [a] State.” *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

15 Contrary to Plaintiffs’ contention, those hypothetical exclusions are not the product of a  
 16 backward-looking “temporal ambiguity” that hinges exclusively on “how long or how regularly  
 17 one must reside somewhere to be considered an inhabitant.” Pl. Opp. at 16. The notion of “usual  
 18 residence” is both backward looking and forward looking. As *Franklin* makes clear, “inhabitation”  
 19 or “usual residence” can mean more “than mere physical presence, and has been used broadly  
 20 enough to include some element of allegiance or enduring tie to a place.” 505 U.S. at 804. That is  
 21 why *Franklin* approved the inclusion of “many federal employees *temporarily* stationed overseas.”  
 22 *Id.* at 806 (emphasis added). A federal employee who left the country to be temporarily stationed

23 \_\_\_\_\_  
 24 <sup>4</sup> Plaintiffs do not explain how their Enumeration Clause claim differs from their Apportionment  
 25 Clause claim. The Enumeration Clause requires only a person-by-person headcount rather than  
 26 estimation; it does not mandate who must be included in that headcount. *See Utah v. Evans*, 536  
 27 U.S. 452, 475 (2002); *see id.* at 493 (Thomas, J., concurring in part and dissenting in part) (“[A]t  
 28 the time of the founding, ‘conjecture’ and ‘estimation’ were often contrasted with the actual  
 enumeration that was to take place pursuant to the Census Clause.”). Certainly, the use of statistical  
 sampling could implicate the Enumeration Clause, but “any methodology or methodologies  
 ultimately used by the Census Bureau to implement the [Presidential Memorandum] will not  
 involve the use of statistical sampling for apportionment purposes.” Abowd Decl. ¶ 23. So  
 Plaintiffs cannot assert a cognizable Enumeration Clause claim here.

1 overseas still has an “enduring tie” to a State such that she may be properly *included* in  
2 apportionment, whereas another long-time U.S. resident who left the country to permanently reside  
3 elsewhere no longer has an “enduring tie” to a State and is properly *excluded* from apportionment.  
4 So too here. Illegal aliens with final orders of removal, if feasibly identified, can properly be  
5 excluded from apportionment whether they entered the United States one day, one month, or one  
6 year (or any other time) before Census Day. Looking forward, it is fully “consonant with, though  
7 not dictated by,” the Constitution for the Executive to find that those aliens lack “the required tie  
8 to [a] State” and should not be represented in numbers used to apportion House seats for the next  
9 ten years. *Id.* at 804, 806.

10 The remainder of Plaintiffs’ arguments boil down to irrelevant quibbles with history. For  
11 example, they point to the full text of the draft Apportionment Clause submitted to the Committee  
12 of Style, which cross-referenced the Direct Taxation Clause and its provision for “the whole  
13 number of free citizens and *inhabitants of every age, sex, and condition.*” Pl. Opp. at 17. But that  
14 says nothing about whether the draft Direct Taxation Clause embraced a definition of “inhabitants”  
15 that included foreigners “of every age, sex, and condition” residing in the United States *in violation*  
16 *of federal law.* Nor can it. As Defendants previously explained, there were no federal laws  
17 restricting immigration (and hence no illegal aliens) until 1875. Def. Mem. at 26 (citing *Kleindienst*  
18 *v. Mandel*, 408 U.S. 753, 761 (1972)). Plaintiffs nonetheless point out that “numerous state laws  
19 *did* prohibit entry by certain persons, and yet those persons were not excluded from the census or  
20 apportionment count despite their unlawful presence.” Pl. Opp. at 17–18. But even accepting  
21 plaintiffs’ characterization of history for the sake of argument, that is also beside the point. The  
22 question here is whether illegal aliens *may* be excluded, not whether they *must*. And Plaintiffs have  
23 identified no evidence showing that the Framers of the Fourteenth Amendment (or of the original  
24 Apportionment Clause) *required* future generations to allocate Congressional representation on the  
25 basis of millions of aliens who remain in the country in ongoing defiance of federal law.

26 For similar reasons, Plaintiffs’ protestation based on “more than two centuries of consistent  
27 historical practice” does not alter the analysis. Pl. Opp. at 18–19. The fact that, “[i]n 230 years,  
28 no apportionment has ever excluded undocumented immigrants on account of their legal status,”



1 *id.* at 19, does not establish that the Executive is constitutionally compelled to use that approach in  
2 perpetuity. Rather, such a practice would at most show that the Executive *may* include illegal aliens  
3 within the apportionment base under the Constitution, not that he *must*. After all, *Franklin* upheld  
4 the Executive’s decision to scuttle a nearly unbroken 180-year-old practice of not allocating federal  
5 personnel stationed overseas to the apportionment base of their home States as “consonant with,  
6 though not dictated by, the text and history of the Constitution.” 505 U.S. at 806; *see id.* at 792–  
7 93. There is no reason why the previous inclusion of illegal aliens in the apportionment base should  
8 be treated as more authoritative than the previous exclusion of overseas personnel abandoned in  
9 *Franklin*.

10 **B. Plaintiffs Fail to State *Ultra Vires* or Separation-of-Powers Claims.**

11 As Defendants have explained, 2 U.S.C. § 2a “tracks the Fourteenth Amendment’s text  
12 mandating apportionment based on the ‘whole number of persons in each State.’” Def. Mem. at  
13 31 (emphasis omitted). Indeed, § 2a(a)’s directive that the President’s report include “the whole  
14 number of persons in each State” (excluding untaxed Indians), 2 U.S.C. § 2a(a), repeats verbatim  
15 the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 2, which in turn modified Article I’s  
16 Apportionment Clause to end the infamous three-fifths compromise, *see* U.S. Const. art. I, § 2, cl.  
17 3. Despite this identical language, Plaintiffs argue that § 2a should be interpreted differently. Pl.  
18 Opp. at 23–24. But “if a word is obviously transplanted from another legal source,” it generally  
19 “brings the old soil with it.” *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018), *remanded*, 753 F. App’x  
20 96 (3d Cir. 2018).

21 Despite this settled canon, Plaintiffs contend that § 2a’s “legislative history squarely  
22 forecloses Defendants’ position,” suggesting that there was “an overwhelming consensus” at its  
23 enactment “that excluding undocumented immigrants would violate the Constitution.” Pl. Opp. at  
24 23. But Plaintiffs wrongly equate aliens with *illegal* aliens. At most, Plaintiffs’ proffered history  
25 suggests that the 1929 Congress (like the Framers of the Fourteenth Amendment) had rejected  
26 amendments to exclude *all aliens* from the apportionment base, and that the Senate’s legislative  
27  
28

1 counsel opined that such an exclusion would violate the Fourteenth Amendment. *Id.*<sup>5</sup> That  
 2 legislative history, however, does not answer whether the 1929 Congress prohibited the President  
 3 from excluding *illegal* aliens from the apportionment base. Although aliens who are “permitted to  
 4 settle and stay in the country,” 1 Emmerich de Vattel, *The Law of Nations*, Ch. 19, § 213 (1760),  
 5 may well qualify as “inhabitants,” that in no way resolves the question here: whether aliens who  
 6 are *not* permitted to settle, and remain subject to *removal* by the government, nevertheless are  
 7 “inhabitants” of, with an “enduring tie to” and a “usual residence” in, the United States. *Franklin*,  
 8 505 U.S. at 804. If Congress in 1929 meant to mandate that congressional representation be  
 9 allocated on the basis of aliens who remain in the country in ongoing defiance of federal law, it  
 10 presumably would have given a clearer indication that it was taking such an important step rather  
 11 than merely copying into the U.S. Code the constitutional text “persons in each State,” which had  
 12 never been understood to compel such a result.

13 Plaintiffs also contend that the Memorandum violates 13 U.S.C. § 141 and 2 U.S.C. § 2a  
 14 because, in their view, the Memorandum “mandates apportionment based on something other than  
 15 the ‘decennial census.’” Pl. Opp. at 25. But *Franklin* explicitly rejected the assertion that the  
 16 Secretary’s initial choices as to the contents of his report must be deemed the one true “decennial  
 17 census.” *See* 505 U.S. at 797 (“Section 2a does not expressly require the President to use the data  
 18 in the Secretary’s report, but, rather, the data from the ‘decennial census.’”). Plaintiffs argue that  
 19 *Franklin* does not “give[] the President authority to manipulate the census tabulation after-the-fact,”  
 20 Pl. Opp. at 26, but *Franklin* confirmed that the President may instruct the Secretary to “reform the  
 21 census,” including by changing the data considered when enumerating individuals. 505 U.S. at  
 22 797–98. “[T]he ‘decennial census’” thus “still presents a moving target, even after the Secretary  
 23 reports to the President” and “[i]t is not until the President submits the information to Congress that  
 24 the target stops moving.” *Id.* Accordingly, Plaintiffs are wrong when they contend that the  
 25 tabulation based on the Residence Criteria is the only one “based on the census itself,” Pl. Opp. at

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26 <sup>5</sup> Plaintiffs also point to statements by three members of Congress, all of which similarly concerned  
 27 aliens generally. Although Plaintiffs represent that Senator David Reed spoke about “an  
 28 amendment to exclude *undocumented* immigrants,” Pl. Opp. at 24 (emphasis added), the  
 amendment at issue was one that, as Senator Reed noted, “would exclude *aliens* from the count.”  
 Doc. 87-6, 71 Cong. Rec. at 1958 (emphasis added).

1 25, because *Franklin* makes clear that the President has full authority to direct a different approach.  
2 *Cf. Wisconsin v. City of N.Y.*, 517 U.S. 1, 23 (1996) (“[T]he mere fact that the Secretary’s decision  
3 overruled the views of some of his subordinates is by itself of no moment in any judicial review of  
4 his decision.”). And because the second tabulation is *also* based on the decennial census (and is  
5 just the result of different policy decisions), there is nothing improper about the President’s decision  
6 to use that tabulation as the apportionment base.

7 Nor is the Memorandum *ultra vires* simply because it “direct[s] the Secretary to give the  
8 President ‘two numbers.’” Pl. Opp. at 25. Again, the President can instruct the Secretary “to reform  
9 the census, even after the data are submitted to him.” *Franklin*, 505 U.S. at 798. In other words,  
10 there is nothing illegal about the Secretary’s transmitting two tabulations *seriatim*. The  
11 Memorandum simply streamlines that process by requesting two tabulations simultaneously. And  
12 Plaintiffs do not dispute that, owing to Article II’s supervisory powers and the Opinions Clause,  
13 they “cannot preclude the President from obtaining information from the Secretary, nor the  
14 Secretary from providing it.” Def. Mem. at 32–33.

15 Finally, because the Memorandum is perfectly consistent with the statutory framework,  
16 Plaintiffs’ separation-of-powers claim fails as well.

#### 17 **IV. Plaintiffs Are Not Entitled to the Relief They Demand.**

18 Despite the fact that precedent forecloses their requested remedies, Plaintiffs nevertheless  
19 insist that they are entitled to declaratory and injunctive relief. Plaintiffs offer no persuasive  
20 argument in support of either form of relief.

##### 21 **A. Plaintiffs Are Not Entitled to Declaratory Relief Against the President.**

22 Plaintiffs assert that declaratory relief against the President is both proper and available.  
23 *See* Pl. Opp. at 27–28. As Defendants have explained, however, the proposition that a court may  
24 issue declaratory relief against the President has been soundly rejected. *See* Def. Mem. at 35.  
25 Plaintiffs counter that *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), does not mean what it  
26 plainly says. *See* Pl. Opp. at 27–28. According to Plaintiffs, “*Newdow* did not hold that declaratory  
27 relief is never available against the President—who was not even a defendant in that case.” *Id.* at  
28 27. But the D.C. Circuit in that case could not have been clearer: “With regard to the President,

1 courts do not have jurisdiction to enjoin him, . . . and have never submitted the President to  
2 declaratory relief.” *Newdow*, 603 F.3d at 1013. *Newdow* does not stand alone: The D.C. Circuit  
3 reached the same conclusion in *Swan v. Clinton*, when it rejected the request of a former member  
4 of the National Credit Union Administration who challenged President Clinton’s decision to  
5 remove him. *See* 100 F.3d 973, 974 (D.C. Cir. 1996). As the court explained, “similar  
6 considerations regarding a court’s power to issue [injunctive] relief against the President himself  
7 apply to [a] request for a declaratory judgment.” *Id.* at 977 n.1. Though Defendants raised *Swan*  
8 in their opening brief, Def. Mem. at 35–36, Plaintiffs fail to address *Swan*, let alone distinguish it.

9 Decisions such as these do not stand in isolation. The Supreme Court in *Mississippi v.*  
10 *Johnson* noted that the judicial branch has “no jurisdiction of a bill to enjoin the President in the  
11 performance of his official duties, 71 U.S. (4 Wall.) 475, 501 (1866), and that “[a]n attempt on the  
12 part of the judicial department . . . to enforce the performance of . . . duties by the President [is] ‘an  
13 absurd and excessive extravagance,’” *id.* at 499. And, more recently in *Franklin*, the Supreme  
14 Court declined a request to enjoin the President in light of *Mississippi*. *See Franklin*, 505 U.S. at  
15 803 (plurality opinion). While these cases concerned injunctive relief against the President, that  
16 same rationale applies with equal force to declaratory relief. *See id.* at 827–28 (Scalia, J.,  
17 concurring in part and concurring in the judgment) (“The President’s immunity from [declaratory]  
18 relief is ‘a functionally mandated incident of the President’s unique office, rooted in the  
19 constitutional tradition of the separation of powers and supported by our history’” (quoting *Nixon*  
20 *v. Fitzgerald*, 457 U.S. 731, 749 (1982)).

21 In an attempt to demonstrate that declaratory relief against the President is available,  
22 Plaintiffs argue that “courts, including the D.C. Circuit, have in fact issued declaratory relief against  
23 the President.” Pl. Opp. at 28. But the case Plaintiffs cite in support for their proposition is a  
24 district court decision that *denied* a plaintiff’s request for relief against the President. *See Citizens*  
25 *for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018) (“*CREW*  
26 *F*”), *aff’d*, 924 F.3d 602 (D.C. Cir. 2019). As the D.C. Circuit explained in affirming that decision,  
27 “[f]or the same reasons that we decline to ‘resort to mandamus’ to micromanage the President’s  
28 day-to-day compliance with the PRA, we shall ‘not entertain [a claim] for declaratory relief.’”

1 *Citizens for Resp. and Ethics in Washington v. Trump*, 924 F.3d at 610 (quoting *Cartier v. Secretary*  
2 *of State*, 506 F.2d 191, 200 (D.C. Cir. 1974)). And, in any event, *CREW I* premised its reasoning  
3 (all of which is dicta in light of its holding) on *National Treasury Employees Union v. Nixon*, 492  
4 F.2d 587 (D.C. Cir. 1974), which, Defendants have explained in their opening brief, is cabined to  
5 relief against “purely ministerial functions” and thus has no application here. *See* Def. Mem. at 35.  
6 Plaintiffs’ only other authority is the decision in the parallel *New York* proceedings, which, of  
7 course, is pending review by the Supreme Court. *See* Pl. Opp. at 28 (citing *New York*, 2020 WL  
8 5422959, at \*35).

## 9 **B. Plaintiffs are Not Entitled to Injunctive Relief.**

10 Plaintiffs acknowledge that they “have not requested injunctive or mandamus relief against  
11 the President in their motions for partial summary judgment.” Pl. Opp. at 28 n.39. Plaintiffs are  
12 also not entitled to injunctive relief against any other Defendant. As discussed, Plaintiffs fail to  
13 demonstrate injury for purposes of Article III standing, *see supra* Parts I & II; they fall well short  
14 showing that such harm is *irreparable* for purposes of injunctive relief. *See Winter v. Nat. Res.*  
15 *Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391  
16 (2006).

### 17 **1. Plaintiffs Cannot Establish An Irreparable Enumeration Injury.**

18 Plaintiffs claim that they “are sustaining current and ongoing enumeration-related injuries  
19 stemming from the Order’s *present* chilling effect on census response,” and that such supposed  
20 harm satisfies their burden for showing irreparable injury. Pl. Opp. at 28–29. As Defendants have  
21 explained, however, Plaintiffs offer scant support for their suggestion that the Memorandum has an  
22 actual impact on responsiveness to the census. Indeed, as Defendants have noted, Plaintiffs cannot  
23 identify a single individual who has declined to respond to the census as a result of the Presidential  
24 Memorandum. Moreover, Plaintiffs’ claim is based almost entirely on supposed impacts—also  
25 unproven—from the abandoned citizenship question. Unlike the citizenship question, the  
26 Memorandum in no way alters the manner in which field operations are undertaken.

27 But even assuming that misinformation about the Memorandum could have an actual effect  
28 on response rates—something Plaintiffs fail to demonstrate—Plaintiffs cannot show that it will

1 ultimately change the enumeration itself. That is because the census is designed to ensure  
2 responsiveness, and mechanisms are in place to ensure that individuals who initially decline to  
3 respond are ultimately counted. *See* Abowd Decl. ¶ 24. Plaintiffs do not contest this fact; instead,  
4 they merely complain that “none of those pre-existing protocols has been adjusted to account for  
5 the *additional* chilling effects caused by” the Memorandum. Pl. Opp. at 29. Such a retort is  
6 unresponsive, to say the least. What matters is whether the procedures the Census Bureau has in  
7 place to ensure responsiveness are effective, not whether they are specifically adjusted in response  
8 to every executive policy that could conceivably impact an individual’s willingness to respond to  
9 a census questionnaire. Plaintiffs have thus failed to carry their “burden to put forth specific  
10 evidence from which the court can infer irreparable harm.” *Adidas Am., Inc. v. Skechers USA, Inc.*,  
11 890 F.3d 747, 760 n.8 (9th Cir. 2018).

12 Finally, Plaintiffs contend that an injunction is warranted because “the Supreme Court’s  
13 decision in” the citizenship-question litigation “held that fears and other ‘predictable effect[s] of  
14 government action’ are cognizable harms.” Pl. Opp. at 29 (quoting *New York*, 139 S. Ct. at 2566).  
15 Plaintiffs’ argument is yet another example of the question begging that informs so much of their  
16 challenge. While “*predictable* effect[s] of government action” may indeed establish entitlement to  
17 injunctive relief, Plaintiffs’ conjecture concerning a supposed “chill” stemming from the  
18 Memorandum comes nowhere close to showing predictable harm. *Id.* (emphasis added).

## 19 **2. Plaintiffs Cannot Establish An Imminent and Irreparable Apportionment Injury.**

20 Plaintiffs’ supposed apportionment injury is likewise foreclosed for the same reasons that  
21 it fails to satisfy Article III requirements for standing and ripeness—it is neither imminent nor  
22 irreparable. *See supra* Parts I & II.

23 Plaintiffs argue that they have established irreparable harm entitling them to an injunction  
24 because no remedy in law, such as damages, will be available. *See* Pl. Opp. at 29–30. To be sure,  
25 in assessing whether an injunction is warranted, courts have evaluated whether the law provides for  
26 non-equitable legal remedies before concluding that the extraordinary relief of an injunction is  
27 warranted. But even assuming that an injunction were the only relief ultimately available, that  
28 would not resolve the inquiry in Plaintiffs’ favor. Plaintiffs seek to enjoin government conduct that

1 does not cause *irreparable* harm—the Memorandum and the pre-apportionment conduct that it  
2 directs. Plaintiffs counter that this is a question of ripeness, not whether they are entitled to an  
3 injunction, but here timing speaks to both questions. Indeed, Plaintiffs themselves acknowledge  
4 that the inquiries inform each other. *See* Pl. Opp. at 28 (referencing Plaintiffs’ standing arguments  
5 in responding to Defendants’ arguments against irreparable harm). The question is what conduct  
6 can, in fact, be enjoined. As precedent makes clear, apportionment injuries are *not* irreparable.  
7 *Evans*, 536 U.S. at 463 (“Should the new report contain a different conclusion about the relative  
8 populations of North Carolina and Utah, the relevant calculations and consequent apportionment-  
9 related steps would be purely mechanical; and several months would remain prior to the first post-  
10 2000 census congressional election.”). Plaintiffs can challenge—and indeed, other plaintiffs have  
11 challenged—supposed apportionment injuries after the apportionment process has completed. *See*,  
12 *e.g.*, *Utah*, 536 U.S. at 462; *Franklin*, 505 U.S. at 803; *Dep’t of Commerce v. Montana*, 503 U.S.  
13 442, 445–46 (1992); *Wisconsin*, 517 U.S. at 1. Plaintiffs cannot reasonably claim that any alleged  
14 harm incurred pre-apportionment cannot be challenged at a later point. Plaintiffs, therefore, have  
15 failed to show irreparable harm.

### 16 **3. The Remaining Factors Weigh Against an Injunction.**

17 Plaintiffs once again argue that the equities and public interest weigh in their favor solely  
18 because they believe that they should prevail on the merits. In so doing, Plaintiffs continue to  
19 assume that they need not demonstrate that other factors also must support injunctive relief. *See*  
20 Def. Mem. at 41–42. But “injunctive relief is not automatic, and there is no rule requiring automatic  
21 issuance of a blanket injunction when a violation is found.” *N. Cheyenne Tribe v. Norton*, 503 F.3d  
22 836, 843 (9th Cir. 2007); *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Plaintiffs’  
23 refusal to engage with the remaining factors resolves the preliminary injunction inquiry in  
24 Defendants’ favor. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 917–18 (9th Cir.  
25 2014) (Arizona waived argument against relief by failing to address the injunction factors).

26 As Defendants have explained, enjoining the enforcement of the Memorandum could  
27 interfere with the Department of Commerce’s ability to provide the President with the data he  
28 requested. *See* Def. Mem. at 37. In so doing, it could impede the President’s ability to exercise the

1 discretion granted to him by Congress to undertake the apportionment. *See Franklin*, 505 U.S. at  
2 796–800. Plaintiffs provide no response to this argument, other than to reassert their belief that  
3 they should prevail on the merits. Plaintiffs have therefore failed to carry the requisite burden of  
4 showing that they are entitled to the extraordinary remedy of a permanent injunction.

5 **CONCLUSION**

6 For the foregoing reasons, and those addressed in Defendants’ opening brief, the Court  
7 should deny the Plaintiffs’ Motions for Partial Summary Judgment and grant Defendants’ Motion  
8 to Dismiss, or in the alternative, Motion for Partial Summary Judgment.

9  
10 Respectfully submitted,

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