No. 20-366

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPELLANTS

v.

STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS

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Appellees agree (N.Y. Br. 3 & n.1) that this Court has jurisdiction over the appeal. And notwithstanding their rhetoric, the substance of their responses confirms that this Court should at least note probable jurisdiction, if not summarily reverse.

I. APPELLEES FAIL TO SATISFY ARTICLE III

As the government has explained (J.S. 13-14), there is a fundamental mismatch between the relief awarded and the speculative injury it purports to address, which leads to multiple Article III problems.

A. Even at the time of entry, it was speculative that the district court's judgment regarding *future* conduct (the Secretary of Commerce's inability to exclude illegal aliens when providing his report to the President on December 31) would likely redress appellees' alleged *present* injury (the Memorandum's "chilling effect" on on-

going census participation), given the prospect of appellate reversal *in the interim*. See J.S. 15-16. Appellees still fail to substantiate their implausible theory that there are a material number of third-party aliens who are so chilled by the President's policy, so emboldened by the district court's relief, and so unfazed by the prospect of this Court's reversal, all at the same time. Unlike a mine-run case seeking to enjoin future acts to redress a future injury, the future relief here purports to redress only a present "chilling effect," yet that judgment can offer no certainty while census participation is ongoing that it will not be reversed before the Secretary's report is submitted.

That the district court granted declaratory relief alongside an injunction, see N.Y. Br. 13-14, does not alter the analysis. To avoid being an advisory opinion, a declaratory judgment must bind the defendant with respect to its future conduct concerning the plaintiff. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 126-127 (2007). Here, until the Secretary sends his report to the President, the declaratory judgment has no effect on the government's conduct, as the district court itself emphasized. See J.S. App. 100a (explaining that the judgment does not prevent the government "from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State"). Again, therefore, any aliens currently "chilled" from census participation by the mere announcement of the President's policy would necessarily be uncertain whether the declaratory judgment will remain in place to constrain the Secretary when he sends his report to the President over two months from now.

Contrary to appellees' contention (ACLU Br. 30), this argument was not waived below. The government

raised the basic objection, though it understandably did not anticipate that the district court would impose a remedy that did not match the sole theory of injury it accepted. See D. Ct. Doc. 118, at 29-30 (Aug. 19, 2020). In any event, the objection goes to the non-waivable "core of Article III's case-or-controversy requirement," as it does not question merely the equitable scope of jurisdictionally proper relief, but whether the relief "will redress the alleged injury" *at all*. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 103-104 (1998).

B. The Article III defect is even starker as matters currently stand: the judgment below will necessarily become moot long before it ever becomes legally effective. J.S. 14-15. Appellees do not dispute that their "chilling effect" injuries will be moot once census field-data collection ends—no later than October 31, and potentially imminently, see Stay Appl., *Ross* v. *National Urban League*, No. 20A62 (Oct. 7, 2020)—and thus well before the Secretary sends his report to the President. Appellees' various efforts to keep the judgment alive all fail.

1. Appellees argue that this case fits within the exception for claims that are capable of repetition yet evading review. N.Y. Br. 15-16. But their claims will not evade review if the judgment is vacated as moot. After the Secretary submits his report and any effects of the Memorandum on apportionment and funding have been determined, any injured parties may seek review, consistent with this Court's normal approach to apportionment litigation. See J.S. 18. There is no basis to continue litigating the validity of this judgment before then, when it remains speculative whether these appellees will actually incur such injuries.

2. Appellees also insist that their asserted apportionment and funding injuries are sufficiently imminent now to sustain the judgment on alternative grounds. N.Y. Br. 17-20. But the district court itself held that their allegation that the Memorandum's differential effect among States will reduce the number of representatives apportioned to them was "likely too speculative for Article III." J.S. App. 43a (citation and internal quotation marks omitted); see D. Ct. Doc. 77, at 58 (Aug. 7, 2020) (appellees' analogous assertion in their summary-judgment brief that they will be "disproportionately deprive[d] * * * of federal funding").

That holding was correct. It is still uncertain to what extent it will be "feasible" for the Executive Branch to exclude illegal aliens from the apportionment base, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020), and doubly uncertain whether the size of the illegal-alien population excluded in any State will have an adverse disparate impact on apportionment (or funding) for appellees, see J.S. 18. Such speculative claims of wholly uncertain future injury cannot save the judgment below from mootness. See *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 96, 100 (2013) (holding that when the "only legally cognizable injury" was "gone" and could not "reasonably be expected to recur," a party could not defeat mootness by relying on "alternative theories" that "would fail to establish standing in the first place"). At a minimum, ripeness concerns strongly militate toward waiting until the Memorandum's implementation. See *Texas* v. *United States*, 523 U.S. 296, 300 (1998).

3. Appellees finally contend that, even if the judgment were moot, this Court should dismiss the appeal *but not* vacate the judgment below. N.Y. Br. 16-17. In seeking a departure from the Court's ordinary practice,

appellees invoke an exception for cases where the party seeking appellate vacatur "caused the mootness" after the judgment was entered. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). But here, the government did not cause the judgment to become moot. Rather, the district court's mismatched relief necessarily was going to moot itself out, as field operations, by definition, must conclude *months before* the Secretary's tabulation is due. Although appellees object to the President's decision to issue the Memorandum in July 2020, the timing of that pre-litigation policy is not the type of post-judgment conduct that "voluntarily forfeit[s]" an appeal and "thereby surrender[s] [a] claim to the equitable remedy of vacatur." *Id.* at 25.

To the contrary, "equitable tradition" strongly supports vacatur here. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25. The government "ought not in fairness be forced to acquiesce in the judgment" barring the President from implementing his policy concerning the decennial apportionment. *Ibid.* Vacatur will "clear[] the path for future relitigation," *id.* at 22 (citation omitted), which appellees will be able to seek if they are actually injured by the Memorandum's implementation.

C. Although the government previously informed this Court (J.S. 11) that it intended to seek a stay based on these timing issues if the district court did not stay its judgment, that plan has been partly overtaken by events: a district court elsewhere has ordered field operations to continue until October 31, see Stay Appl. at 15-19, *National Urban League*, *supra* (No. 20A62), and this Court expedited consideration of the jurisdictional statement here. At this point, if field operations have concluded by the time the jurisdictional statement is

considered, this Court can summarily vacate the judgment or stay it *sua sponte* so that expedited resolution before the end of the year would be unnecessary. If, however, field operations remain ongoing and this Court notes probable jurisdiction, it would need to expedite the appeal in order for the government to meet the statutory deadlines, though the government would still intend to move for vacatur or a stay on mootness grounds once field operations end.

II. THE PRESIDENTIAL MEMORANDUM DOES NOT VIOLATE THE LEGAL PROVISIONS GOVERNING THE CENSUS AND APPORTIONMENT

A. As the government has explained (J.S. 18-23), the district court contradicted the Constitution, the Census Act, and *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), in holding that an apportionment pursuant to the Memorandum would not be "based on the results of the census alone," J.S. App. 74a (capitalization and emphasis omitted). Appellees offer no persuasive response.

Although appellees initially suggest that the President has a largely ministerial role in the apportionment, ACLU Br. 22-24, they ultimately do not dispute *Franklin*'s holding that the President has discretion in supervising the Secretary's determination of what constitutes the "decennial census" for the apportionment base, J.S. 20-21. Instead, they insist that, regardless of whether the President *could have* ordered the Secretary to exclude illegal aliens from the census, he *did not do so*, instead allowing the Secretary to include them in the census but then excluding them himself from the apportionment. ACLU Br. 34-36. That is incorrect.

The Memorandum directs the Secretary, "[i]n preparing his report," to include (1) population information "tabulated according to the methodology set forth in"

the Census Bureau's Residence Criteria, and (2) "information permitting the President, to the extent practicable," to implement his policy of excluding illegal aliens from the apportionment base. 85 Fed. Reg. at 44,680. That the President allowed the Bureau to complete an initial count pursuant to the Residence Criteria, and required the Secretary to include both sets of numbers in his report, simply reflects that "the 'decennial census' still presents a moving target[] even after the Secretary reports to the President," as the report remains "subject to correction" by the President. *Franklin*, 505 U.S. at 797.

Appellees doubly err in asserting that this case differs from *Franklin* because that case "involved the *conduct* of the census," ACLU Br. 27 (citation and internal quotation marks omitted), while the Memorandum purportedly does not, simply because it was issued in July of 2020 during the ongoing census. To begin, the decision at issue in *Franklin* likewise occurred in July of 1990 while the census was ongoing. 505 U.S. at 794. And more fundamentally, *Franklin* confirmed that the President may instruct the Secretary to "reform the census[] *even after* the data are submitted to him." *Id.* at 798 (emphasis added). It cannot be that the President may demand new data seriatim, as in *Franklin*, but not in parallel, as here.

Appellees also claim that the Bureau may use administrative records only "to decide *where* to allocate people who should be *included* in the enumeration" and "to fill 'gaps' in self-responses." ACLU Br. 27-28 (citation omitted). Again, *Franklin* instructs otherwise: the Court approved the use of administrative records to determine *who* should be included in the 1990 census—in particular, certain overseas personnel and their

dependents, none of whom would otherwise have been included under prior practice. See J.S. 21-23. And appellees offer no explanation for why administrative records may be used to add persons to—but not "subtract" them from—"the enumeration." ACLU Br. 28. Both are exercises of the discretion to take the "decennial census" "in such form and content as [the Secretary] may determine," 13 U.S.C. 141(a), subject to "the President's authority to direct the Secretary in making policy judgments," *Franklin*, 505 U.S. at 799.

Finally, appellees' analogous constitutional objection (ACLU Br. 24-25) fails for the same reason. The Constitution provides that the enumeration must be conducted "in such Manner as [Congress] shall by Law direct," U.S. Const. Art. I, § 2, Cl. 3; "Congress has delegated its broad authority over the census" to the Executive "[t]hrough the Census Act," *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996); and, as explained, the Memorandum permissibly exercises that discretion.

B. The government has further explained (J.S. 23-33) that the phrase "persons in each State" does not divest the President of discretion to exclude illegal aliens from the apportionment based on their immigration status. Appellees do not meaningfully dispute that to prevail on the claim in this posture, they must show that the terms "inhabitant" and "usual resident" *unambiguously* encompass *all* illegal aliens. J.S. 28-29. Instead, they contend that the terms have a "long-settled historical meaning," and that the meaning covers "all persons living in each State." N.Y. Br. 23, 27 (emphasis omitted). They are mistaken in both respects.

1. To begin, even a broad definition of "inhabitant" would not cover every illegal alien living in the country. Appellees barely engage, for example, with precedent

holding that illegal aliens paroled into the country pending removal proceedings are legally deemed not to be "dwelling in the United States," *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925)—even though, as appellees admit, Founding-era dictionaries equated "inhabitant" with "[d]weller," ACLU Br. 20 n.4 (citation omitted). Nor do they explain how aliens held in detention facilities after being arrested while crossing the border are somehow less "transient," N.Y. Br. 30 (emphasis omitted), than aliens they agree may be excluded despite living here for considerably longer periods, such as diplomats.

Appellees nevertheless suggest that because the Bureau announced that it would treat those categories of illegal aliens as "usual residents," the President must follow suit. N.Y. Br. 29. But the Bureau does not bind even the Secretary, see *Wisconsin*, 517 U.S. at 23, much less the President, see *Franklin*, 505 U.S. at 799.

Appellees alternatively suggest that they need not address "hypothetical subset[s]" of illegal aliens because the President seeks "categorical exclusion." N.Y. Br. 30. But the Memorandum aims to exclude illegal aliens only "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." 85 Fed. Reg. at 44,680. That limitation is not merely an implementation directive, but part of the policy itself. See *ibid.* And it is appellees who chose to bring this facial challenge before the Executive Branch could determine which exclusions may be "feasible" and "consistent" with its discretion, thus requiring appellees to show that no such exclusion is permissible.

2. In any event, appellees fail to demonstrate that their definition of "inhabitant" is the only one available.

a. Starting with text, appellees do not deny that figures such as Madison, Marshall, and Vattel shared an

understanding of "inhabitant" that turned on the sovereign's permission for an alien to remain in the jurisdiction. J.S. 26-28. Instead, they dismiss as irrelevant Vattel's definition of "'inhabitant'"—which was limited to a subset of aliens—because adopting it "would exclude all citizens from the population base." ACLU Br. 20 (citation and emphasis omitted). But the government has never contended that Vattel's definition would have been understood as comprehensively describing the full scope of "inhabitants" for constitutional purposes. Rather, Vattel's definition is relevant in determining how the general term "inhabitant" should be applied to aliens specifically, just as this Court in *Franklin* considered evidence of how that term was originally applied to federal officials serving overseas. See 505 U.S. at 805. Indeed, the draft Constitution used the phrase "citizens and inhabitants" to describe the apportionment base, underscoring that the historical understanding of noncitizen "inhabitants" is highly probative. 2 *The Records of the Federal Convention of 1787*, at 571 (Max Farrand ed., 1911); see *id.* at 566.

Ultimately, appellees just equate "inhabitants" with all "'persons' living 'in each State.'" N.Y. Br. 31 (citation omitted). But this Court has rejected the proposition that "the mere living in a place constitute[s] inhabitancy" in all cases. *Franklin*, 505 U.S. at 805 (citation omitted). In fact, the term has been used in ways that connote "some element of allegiance or enduring tie to a place." *Id.* at 804. Appellees neither address this point nor explain how there is anything "usual," in the sense of "customary," about residing in a country in ongoing defiance of its laws. J.S. 31-32.

b. Turning to history, appellees fail to substantiate their remarkable contention that those who adopted the

Constitution, the Fourteenth Amendment, and 2 U.S.C. 2a(a) mandated that illegal aliens be included in allocating congressional representation among the people of this Nation. See N.Y. Br. 22-28. As explained (J.S. 32-33), the failure to enact legislation requiring the exclusion of *all* aliens from the apportionment base shows nothing about whether the President is permitted to exclude *illegal* aliens. And appellees are no more persuasive in invoking legislative history from 1929 concerning illegal aliens specifically. See N.Y. Br. 25. The failure to enact a plan to use the enumeration as a means to identify illegal aliens for purposes of their *removal* in no way shows that Congress compelled the President to include illegal aliens within the *apportionment base*. See 71 Cong. Rec. 2456 (1929); see also *id.* at 2283 (statement of Sen. Robsion).

Appellees fare no better in objecting that the Memorandum "breaks with more than two hundred years of history." N.Y. Br. 21. Even setting aside that there were no federal immigration restrictions until 1875, *Kleindienst* v. *Mandel*, 408 U.S. 753, 761 (1972), the past practice of including illegal aliens in the apportionment shows at most that the Executive may include this population, not that it must do so. In *Franklin*, this Court upheld the Executive's decision to scuttle a nearly unbroken practice from 1790 to 1990 of excluding overseas federal personnel and their dependents. 505 U.S. at 806; see *id.* at 792-793. Appellees offer no justification for treating the historical inclusion of illegal aliens as more controlling.

Finally, appellees misread *Evenwel* v. *Abbott*, 136 S. Ct. 1120 (2016), as holding that States may use their "'total population'" for "intra-state redistricting" because the President must use "'total population'" for

"inter-state apportionment." ACLU Br. 19-20. As the *Evenwel* plaintiffs argued only that a State must exclude *all non-voters*, see 136 S. Ct. at 1123, this Court never addressed whether a State must (or may) exclude *illegal aliens* in particular from intra-state redistricting, let alone whether the President may exclude them from inter-state apportionment.

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The Court should note probable jurisdiction or summarily reverse.

Respectfully submitted.

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