Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STATE OF NEW YORK, et al.,

Plaintiffs,

v. 20 CV 5770 (RCW)(PWH)(JMF)

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

Defendants.

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New York, N.Y.
September 3, 2020
10:00 a.m.

Before:

HON. RICHARD C. WESLEY,
Circuit Judge

HON. PETER W. HALL,
Circuit Judge

HON. JESSE M. FURMAN,
District Judge

APPEARANCES (Telephonic)

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Attorneys for Governmental Plaintiffs
BY: JUDITH VALE

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Attorneys for NGO Plaintiffs
BY: DALE HO

U.S. DEPARTMENT OF JUSTICE
OFFICE OF SOLICITOR GENERAL
Attorneys for Defendants
BY: SOPAN JOSHI

(Via telephone)

JUDGE FURMAN: Good morning and welcome. Since the panel is now here, we can get started.

Let me go over a few ground rules before we take appearances. First, this is Judge Furman. Let me ask that if you're not speaking that you mute your line, although remember to unmute yourself if you want to say anything, and I will do the same when I'm not speaking.

I will also try to model this, but I would ask that anytime anyone says anything, please begin by saying your name, just so that the court reporter and the Court know who is speaking and that is clear. There shouldn't be any chimes during our call. In theory, everybody who is on the speaking line should already be here, but if you hear a chime and you're speaking, just pause for a moment so that I can take stock of who has either joined or left, as the case may be, and make sure that everybody is still with us.

A reminder to everyone, whether you're on the listen-only line or the speaking line, that you are prohibited from recording this conference, and a reminder, of course, that it is a public conference as it would be if it were being held in open court.

With that, I will take appearances from counsel, beginning with counsel for the plaintiffs.

Let me start with the governmental plaintiffs.

MS. VALE: Yes, your Honor, this is Judith Vale for the governmental plaintiffs.

JUDGE FURMAN: Good morning, Ms. Vale.

And for the NGO plaintiffs?

MR. HO: Good morning, your Honors, Dale Ho for the non-governmental plaintiffs.

JUDGE FURMAN: Good morning to you.

And finally for the defendants?

MR. JOSHI: Good morning, your Honor, Sopan Joshi for the defendants.

JUDGE FURMAN: Good morning to you and Mr. Ho as well.

All right. With that, unless my colleagues have anything they want to add by way of preliminaries, I think we can get started. As indicated in our order, basically each side will have something in the neighborhood of 20 to 30 minutes. I don't think that we need to set a strict time limit per se, but hopefully we will continue along if it's helpful to us.

We'll begin with the plaintiffs since they filed the initial motion. I think you can probably guess from some of our questions that you should focus in the first instance on the jurisdiction and justiciability issues of standing and ripeness. Those are obviously threshold issues in any event, but if you want to begin by addressing those, I think that would be helpful.

Before you do that, let me check with Judges Wesley and Hall to see if there's anything that they want to say before I turn it over.

Judge Hall?

JUDGE HALL: Nothing for me. Thank you, Judge Furman.

JUDGE FURMAN: And Judge Wesley?

JUDGE WESLEY: No, I'm fine. Thank you very much, Judge Furman.

JUDGE FURMAN: I don't know, Mr. Ho or Ms. Vale, which of you intends to go in the first instance, but I will turn it over to one of you.

MS. VALE: Yes, your Honor, this is Judith Vale for the governmental plaintiffs.

If the Court is amenable, I would like to start with the justiciability issues for the apportionment harms, and particularly with ripeness. And then I will turn it over to Mr. Ho for justiciability issues on the census count harms, including traceability and redressability, and then turn to merits with myself addressing constitutional apportionment claims. And then I will turn it back to Mr. Ho for the statutory claims plus the Courts' questions about scope of relief, and we would also appreciate an opportunity for a short rebuttal on the summary judgment motion.

JUDGE FURMAN: All right. You may proceed.

MS. VALE: Thank you, your Honor. This case is ripe

because plaintiffs are substantially likely to be injured by the categorical and blatantly unconstitutional exclusion of undocumented immigrants from the apportionment base. That likely injury provides standing and constitutional ripeness, and there is no prudential reason for the Court to wait to decide the purely legal questions presented rather than resolving them now and preventing the injury and disruption and uncertainty that will otherwise hang over the apportionment of seats in the House of Representatives and the plaintiffs' redistricting processes.

The memorandum itself makes clear that at least some of the plaintiffs are substantially likely to lose House seats and Electoral College electors by the subtraction of undocumented immigrants from the apportionment base. As the memo says, that is defendants' express intention, to have some states with many undocumented immigrants lose House seats.

And the memo itself predicts that excluding undocumented immigrants will likely result in California losing at least one seat. The same result is exceedingly likely in Texas. Defendants' own predictions are enough for ripeness, but the undisputed declaration of Dr. Warshaw confirms that there is a 98 percent likelihood that Texas will lose a seat, a 72 percent likelihood that California will lose a seat, and a 70 percent likelihood the New Jersey will lose a seat. Defendants have provided no evidence to rebut that, so there is

no issue of disputed fact here about the substantial likelihood of injury.

That's more than enough for ripeness, because substantial likelihood is enough, as the Supreme Court and this Court has made clear in cases like *Department of Commerce* and *House of Representatives*, the latter of which was decided on a summary judgment motion before the census or apportionment had happened. Those cases make clear that a predicted future injury is enough as long as it's substantially likely. You do not need a literal certainty, just enough to have a concrete rather than purely hypothetical stake in the matter.

JUDGE FURMAN: Let me stop you, Ms. Vale. This is Judge Furman.

Number one, do you agree that those harms could be remedied after the President submits his report to Congress, as was the case for instance in *Utah v. Evans*; and number two, are you not ignoring the language in the Presidential Memorandum that directs the Secretary of Commerce to provide information only if it is, quote, unquote, "feasible?" That is to say, we don't yet know whether and to what extent he will provide the information being requested.

MS. VALE: To take the first question first, your Honor, while the plaintiffs think that it is at least possible for the Court to provide relief after January, it's not certain that defendants agree. It seems like there will at least be a

substantial question as to whether and how long it would take defendants to fix the apportionment after the fact, given that they are here arguing that no injunction can be issued against the President at all. Under their theory, it seems like the case cannot be ripe until the President issues his report. But once he does so it is at least unclear how the Court will provide effective relief without ordering the injunction that defendants say is not possible.

But even assuming that it is possible, as we think, to get relief, that's not the standard for ripeness. Even though it might be possible to get relief, there will still be hardship and disruption and uncertainty to plaintiffs and the public because plaintiffs' redistricting processes start right after the apportionment reports go out. The data to the States starts to roll out in February. By statute, all the data has to be out by March, and States can and do start at that point a long process that has many steps that will be disrupted if it turns out that everyone is working off an unconstitutional apportionment.

And by "disruption," I mean for example that States like New York and California have robust public participation processes that are required that involve public meetings in cities and counties all around the State, opportunities for the public to send in maps based on the apportionment that has been done. In New York, the public needs to receive draft maps that

the officials have done. And this is all real work that takes time and resources and is important for the legitimacy of the process.

JUDGE WESLEY: Ms. Vale, this is Judge Wesley. But that's not to say, having once participated in a redistricting process in a former life of the legislature, it's necessarily pleasant and often long and drawn out, but that's not to say that because these things are difficult that they couldn't be done if a court at some point in time ultimately said that the numbers that the Secretary of Commerce propose or identifies to send to the President would constitute *ultra vires* or inappropriate data from which the President could then perform his ministerial functions, would it?

What keeps us from waiting, from a prudential standpoint, waiting until the Secretary of Commerce comes up and says "Okay, Homeland Security tells me there are 1.5 illegal aliens living in so and so," and then isn't it crystal clear to everybody what the nature of the dispute is and whether that number could or could not be used by the President?

MS. VALE: Yes, your Honor, this is Judith Vale. I agree that it might still be physically possible to redistrict again and start the process again if it needs to be changed, but there would be substantial hardship and disruption to the process. And when we're talking about ripeness, especially in

an area like redistricting, which is critical for elections, there's a strong principle in cases like *Purcell* that we should resolve these disputes earlier rather than later before we start getting even close to deadlines because so many stakeholders, including officials and candidates and residents, need more time rather than less, or at least benefit from more time rather than less.

Turning to the issue --

JUDGE WESLEY: Excuse me, this is Judge Wesley again. Did the States identify any injuries to them from the census undercount other than with regard to reapportionment?

MS. VALE: Yes, your Honor. The undermining of the census count itself also harms the State, the undermining that is happening right now because of the memorandum, because States use the census data to do redistricting and for many other things as well.

JUDGE WESLEY: Wait a second. Federal funds with regard to clean waters, federal funds with regard to transportation, highway/bridge repair, all kinds of local aid that goes out from the State that is funneled through the State is premised on census data, isn't it?

MS. VALE: Many things are premised on census data, correct.

JUDGE WESLEY: I don't understand then why the census count isn't a more immediate injury to you as opposed to the

reapportionment.

MS. VALE: I agree that the census count harm is more immediate in time and quite serious because so many things flow from the census count. I will defer I think to my colleague Mr. Ho on some of the issues about the census count harm, but I certainly agree that that is also a very immediate and serious injury that also provides both standing and ripeness, and that needs to be resolved as soon as possible.

And I do want to touch on two other things. Going to Judge Furman's second question about defendants' speculation that they might not be able to do what the President has directed, the possibility that defendants might do a bad job at doing what the President has commanded is not the type of future contingency that can defeat ripeness. The memorandum says, quote, "It is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." It is not a suggestion to do research about this, it is a final policy and a directive from the President, and defendants admit that they are doing everything that they can to exclude all undocumented immigrants. Dr. Abowd's declaration says that the Census Bureau is working on implementing this right now. Director Dillingham testified to the same in Congress. This is what they want to do, they want to exclude all undocumented immigrants, not a sliver.

Now it is always possible that the government, having

made a final decision, may change course later if it turns out that what they have finally decided to do turns out not to be feasible. That's always a possibility, and it does not undermine ripeness. And the courts have made that clear in cases like *Central Delta* and this Court's decision in *Department of Commerce* where OMB had to review the citizenship question and could have rejected it, could have said we're not doing this. But that didn't undermine ripeness because Secretary Ross had already made that decision. That decision was effected and was being implemented. And the same thing is true here. Even if it's possible that defendants might abandon it if it turns out that they can't do what they want to do, the President has already decided that this is the final policy and defendants are already implementing it.

JUDGE FURMAN: Let me interject. I would say, unless my colleagues have additional questions on this round, I would propose that we shift gears and let Mr. Ho address the census harms.

Let me check with Judge Wesley, any further questions from you?

JUDGE WESLEY: I'm good, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thanks, I'm fine.

JUDGE FURMAN: So with the apologies to you, Ms. Vale, let me turn to Mr. Ho and pick up with the second serious harm.

Go ahead, Mr. Ho.

MR. HO: May it please the Court, Dale Ho on behalf of the non-governmental plaintiffs.

The defendants' policy of excluding undocumented immigrants from the census is causing ongoing injury to the plaintiffs because it is deterring census responses now. By undermining the Census Bureau's core outreach message that everyone counts in the census, that is degrading the quality of census data that's used for a wide variety of purposes, and it's causing our clients, in particular seven immigrant sites organizations, to divert resources to combat these negative effects, resources that could be rerouted to other organizational priorities. These facts establish standing under the Supreme Court's decision in the citizenship question case last year where the Court held that injury due to government action that predictably reduces census responses is traceable back to the government and redressable via an injunction. Not a single justice dissented on that point.

And because these census count injuries are occurring now, we seek immediate relief from this Court. We believe that summary judgment on standing is appropriate, as these injuries are not genuinely disputed given the absence of contrary evidence about the quality of the census count. And for purposes of appellate review, we would also request that this Court further find that if preliminary fact finding is

necessary on these threshold issues that the preponderance of the evidence establishes standing on the basis of this census count injury.

If I could go into a bit more detail, there's really no genuine dispute that the Presidential Memo is suppressing census responses now. There are two reasons why it's doing that. The first is that it communicates directly that census participation is a futile act for undocumented immigrants. And that sows confusion in the broader immigrant community and, as I mentioned, undermines not only the Census Bureau's core outreach message but the outreach work of non-governmental organizations like the plaintiffs on whom the Census Bureau relies to ensure an accurate count. Second, it triggers mistrust in immigrant communities by signaling that lawful status is a component of census participation.

Again, these two reasons that the Presidential Memo undermines census participation are essentially uncontradicted in the record. The former Census Bureau Director John Thompson, who submitted two declarations on our behalf, Exhibits 57 and 66, explains these points in some detail, as well as declarations from our clients. Those are at Exhibits 14, 18, 26, 36, and 43. And I think it's somewhat ironic that the government discounts their testimony kind of with a wave of a hand, given that as Judge Furman found in your Honor's trial decision last year, the Census Bureau itself relies on

organizations like the NGO plaintiffs to ensure a successful census.

And it's not just our clients' testimony. The notion that excluding undocumented immigrants from the census will harm the accuracy of the census is actually consistent with the defendants' own longstanding position going back decades. As far back as 1989, Commerce Secretary Mosbacher wrote a letter to Congress opposing an effort to exclude undocumented immigrants from the census, noting that it would, quote, "jeopardize the accuracy of the census." We neglected to cite that in our brief, but it is referenced in our amended complaint with a hyperlink to the letter at paragraph 171. And just a few weeks ago, former Census Bureau Director Vincent Barabba, who oversaw the 1980 census, testified before Congress that immigrants will be, quote, "less likely to fill out the census because of the Presidential Memo." That's cited in paragraph 173 of our amended complaint.

And the timing for this couldn't be worse. The enumeration period is set to end at the end of this month. So these injuries are occurring now, they're degrading the quality of the census data now, and we need immediate relief from this Court to avoid those injuries.

JUDGE FURMAN: Mr. Ho, this is Judge Furman. Let me jump in and ask you to address the issues of traceability and redressability, which obviously are independent requirements

for standing. The defendants argue that the harms that you're describing are not traceable to the memorandum but rather the misreporting about the memorandum. That is, in essence, the argument.

And number two, particularly to the extent that you're relying on the diversion of resources needed for the NGOs to convey the message that everybody does in fact count, et cetera, would a judicial ruling in your favor actually redress that harm, and would you actually need to spend more when your organizations have to divert even more resource to essentially make sure that everybody was aware of the Court's ruling and that everybody does count?

MR. HO: Thank you for those questions, Judge Furman. With respect to the question of traceability, the Supreme Court explained in *Lujan* that traceability simply requires a causal connection between the government's challenged action and the injury that the plaintiffs are asserting. And as the Supreme Court held in the citizenship question case last year, the predictable effect of government action on the decisions of third parties is traceable back to the government. There was a citizenship question which predicably reduced census participation. Here it's the decision to exclude undocumented immigrants. Again, that's a predictable outcome of the government taking an official position that census participation for undocumented immigrants is a futile act

because the core purpose of the census, the apportionment of political representation, the participation of undocumented immigrants will ultimately be irrelevant to that core constitutional function of the census. It not only communicates futility to them, it creates confusion in the broader community about whether or not census participation is actually required for everyone, because the Census Bureau's core message has been everyone counts in the census unequivocally, categorially, and now there's a lot of widespread confusion about that.

I don't think that's because of media misreporting, but even if this Court were to determine that there were other factors that were contributing to the effect of the Presidential Memo on census responses, that wouldn't destroy traceability. As your Honor put it in your trial decision, even in a dry season it is fair to trace the fire to arsonist. The Presidential Memo is undoubtedly the cause of the reduction in census participation that our clients testified about in their declarations, and that's supported by not just the former Census Director John Thompson's declaration, but also the declaration of political scientist Matt Barreto, on whom we relied at trial last year.

If I could turn to your second question, these injuries are also redressable here. In order for a plaintiff to establish redressability the Supreme Court explained in

Larson v. Valente that the relief requested will remedy, quote, "an injury to the plaintiff, not every injury to the plaintiff."

And two basic facts establish redressability here. First, as Former Bureau Director Thompson testified, enjoining the Presidential Memo would mitigate its damage and, quote, "improve the effectiveness of census outreach efforts." That's in his supplemental declaration at Exhibit 66. And then the supplemental declarations of three of our clients, Exhibits 62 through 64, all indicate that if their outreach were made more effective because of an injunction against the Presidential Memo, that would free up significant time and resources that could then be rerouted to their pre-existing organizational priorities, such as Covid relief.

Now these facts, they're not genuinely disputed by the defendants. There isn't any evidence that the defendants have put in, for example, that the Presidential Memo is having no effect on census outreach efforts. And I think that's telling. The Census Bureau represents I think repeatedly throughout litigation that the decennial census is the largest peacetime mobilization of federal personnel that the country engages in. There are census takers all throughout the country right now and field operation supervisors out there. And it's I think telling that not a single one of them has submitted a declaration saying that the Presidential Memo hasn't affected

their work in any way. The only thing we have is a declaration from Mr. Lamas who says that the Census Bureau isn't changing its operation in any way in response to the Presidential Memo. But I think that only shows precisely why what the Census Bureau is doing right now is inadequate to mitigate the damage of the Presidential Memo because they're not doing anything to account for the deterrent effect that the memo is having.

JUDGE HALL: Mr. Ho, this is Judge Hall. Could you address, for me at least, why the burden that the NGOs have taken on with respect to the census, which are causing them now as a result of the memorandum as alleged and supported by data, causing them to do more work, why that isn't a self-imposed burden?

MR. HO: Thank you, Judge Hall.

JUDGE HALL: Why they couldn't just shift their resources anyway to deal with Covid cases and those sorts of things.

JUDGE FURMAN: Mr. Ho, hold on one second. This is Judge Furman, and let me just add to that the following question, which is: Could we rely solely on the diversion of resources, a *Havens Realty* theory of standing, if you will, in the wake of *Clapper*, or does *Clapper* not stand for the proposition that the expenditure of resources is a self-inflicted harm unless it is intended to prevent a harm that would itself constitute Article III injury?

MR. HO: Thank you, Judges Hall and Furman. If I could start by addressing Judge Hall's question, the notion that the diversion of resources to account for the deterrent effect of the government's action on census responses, the notion that that is a form of self-inflicted injury. I think the Supreme Court's decision in the citizenship question litigation last year forecloses that particular argument. Advocacy on behalf of immigrants and immigrant communities is a central core aspect of our clients' missions. That work has been made harder by virtue of the government's action. And under *Havens Realty*, the diversion of resources from other organizational priorities in order to account for the negative effects of government action, that's cognizable injury and it's not deemed self-inflicted.

In response to your question, Judge Furman, about whether or not *Clapper* changes the equation there, I don't think it does. *Clapper* did not overrule *Havens Realty sub silentio*. I think what *Clapper* is best understood as stating is that resource diversion is not a cognizable injury where it's in response to a speculated or assumed harm. In *Clapper*, the plaintiffs didn't know whether or not they were actually being surveilled by the government, they simply assumed that they were and diverted resources to try to account for that.

Here, by contrast, there isn't any speculation about the need for resource diversion, and there are two reasons why

that's the case. The first is that the deterrent effect on census responses is happening now. It's being observed now in the communities where census outreach is happening. It's not something that is speculated or assumed. And second, the government's policy is not speculated or assumed, it's unequivocal and categorical that the policy of the United States is to exclude from the apportionment base aliens who are quote, "not in lawful status under the INA," and it's being implemented now, as the government's own submissions indicated.

And I think in response to the third bullet point from the Court's order as to whether or not the underlying harm for which the plaintiffs are diverting resources, whether or not that underlying harm itself must be sufficiently imminent and impending to satisfy Article III requirements, I don't think it does, because as Judge Furman noted in your Honor's trial decision last year, it would be illogical to recognize that organizations may be injured and have cognizable standing by virtue of expenditures, but only in cases where that would be superfluous because they're also suffering a separate underlying injury which itself satisfies Article III requirements.

Organizational plaintiffs asserting *Havens Realty* standing have never been required to do that. The plaintiffs in *Havens Realty* itself did not suffer an underlying cognizable injury for which they diverted resources. That case I believe,

as I'm sure the Court recalls, was a case about housing discrimination. The plaintiffs themselves did not suffer from housing discrimination but they were first forced to divert resources in order to respond to a pattern of housing discrimination in their community. And the Supreme Court held and has not since departed from the holding that that kind of resource version is cognizable, it's traceable to challenged conduct, and it's redressable by an injunction blocking that conduct.

JUDGE WESLEY: Mr. Ho, this is Judge Wesley. In light of your answer there, where do we look and what assurances do the NGO plaintiffs make with regard to the fact that an injunction would somehow remedy the situation and thwart the undercount in any significant way? And how significant need it be for it to meet the test of redressability?

MR. HO: Well, I don't think there's a bright line that the Court can point to below which a certain percentage of the injury would somehow defeat standing. I would just look to Supreme Court's language in *Larson v. Valente* that as long as an injury to the plaintiff is remedied, that establishes redressability. We don't have to redress every injury to the plaintiff. In *Larson* the plaintiffs were religious organizations who challenged one of several requirements to obtain a religious organization exemption from certain governmental reporting requirements. The defendants argued

look, if the court enjoins one of these requirements, the plaintiffs will still have to satisfy all of the other ones. There's no guarantee they will be able to do that, they may end up in the same place as a practical matter even after relief is ordered. And the Supreme Court held: Look, that doesn't defeat redressability. Their job is now easier, and they may not ultimately obtain the religious organization exemption, but it will be easier for them to do so and that is meaningful relief.

And I think the same holds true here. We have uncontroverted testimony from a former director of the Census Bureau who says census outreach will be made easier if this Court issues declaration that it is unlawful under federal law to exclude undocumented immigrants from the census count. And we have three declarations, the supplemental declarations that I mentioned earlier at Exhibit 62 through 64 from three of our clients, FIEL in Texas, Make The Road in New York, and ARI in Southern California, all of them stating that if their census outreach efforts could be more effective in the remaining non-response follow-up period that would not only help them advance their organizational missions but it would free up a significant amount of staff time and resources which they could then reroute to their existing programmatic work.

JUDGE FURMAN: Thank you, Mr. Ho. Unless my colleagues have any other questions, I propose that we move on

to next area, which I think is the merits.

But let me check, Judge Wesley, anything from you?

JUDGE WESLEY: No, thank you very much.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thank you, I'm fine.

JUDGE FURMAN: All right. So I think Ms. Vale had said that she was going to address the constitutional issues, if I remember correctly.

MS. VALE: Yes, Judge Furman, I will. If I could add just one new thing on the census count harm that I just want to stress, which is that it is not just diversion of resources that is a harm from the census count harm, but also, as Judge Wesley was suggesting, much funding for many, many programs with federal funding comes from the census count, and that flows through the states and then to the counties who are plaintiffs here. And the census data is also used for redistricting. So there are severe harms that do come from the census count in addition to diversion of resources, and that injury is shown through the detailed declaration that defendants have not even tried to capture.

JUDGE FURMAN: This is Judge Furman. Let me ask you a question on the merits, sort of threshold question, which is that both sides have focused on the constitutional claims and arguments, but shouldn't we first look at the statute? And if we can decide the case on statutory grounds without needing to

reach constitutional issues, shouldn't we do that?

And to the extent there is any doubt about how to construe the statute, should the doctrine of constitutional avoidance not play some role?

MS. VALE: Yes, your Honor, this is Judith Vale. Certainly if the Court thinks that excluding all undocumented immigrants -- I might agree that it does, that that is another basis to invalidate this memorandum, but we don't think that the principle of constitutional avoidance holds that much sway here for a couple of reasons. One is, as mentioned before, because we are talking about something as important as redistricting that affects elections, there is also a strong legal principle that those decisions should be decided early and that we shouldn't wait or hesitate to resolve issues that affect something like elections. And I think that principle sort of counteracts constitutional avoidance here.

And we don't think this is a difficult constitutional question. We think that the categorical exclusion of undocumented immigrants who undisputedly live here blatantly violates the Constitution and the Census Act. As this Court said in *Department of Commerce*, the Constitution requires the apportionment base to include every single person residing here, whether living here with legal status or without. And that command in the Constitution is crystal clear from the terms of the 14th Amendment which requires the inclusion of the

whole person of numbers in each state, and more than 200 years of history, practice, judicial precedent, including the *Evans* decision and defendants' own representations in past litigation.

Defendants simply have no authority, no discretion to subtract millions of undocumented immigrants even though they have every indicia of usually residing here. They in fact do live here most of the time. They have done so for a long time. For example, DHS estimated that in 2015 9.6 million undocumented immigrants have lived in the United States for more than ten years. Millions of these undocumented immigrants intend to keep living here, and in fact will keep living here, even if defendants wish that it were otherwise.

And defendants themselves are going to make the essentially factual finding under the residence rule that millions of undocumented immigrants do usually reside here, and they are going to count them in the actual enumeration because they usually reside here. And the memorandum is directing defendants to simply ignore all of that, simply disregard that millions of undocumented immigrants usually reside here, ignore that, even though it is the lodestar of the 14th Amendment and apportionment, and subtract them based solely on their undocumented status. And that is just blatantly --

JUDGE FURMAN: Let me interrupt, this is Judge Furman. Could you address the defendants' argument that you are

bringing a facial challenge, and as such that you have to demonstrate that it is unlawful to exclude essentially all categories of illegal aliens, including, for instance, illegal aliens apprehended at the border who are being held in detention pending removal? Do you agree with that, and if you don't, do you have authority that would support your proposition on that front?

MS. VALE: We don't agree with that characterization of this case at all. I think that characterization of this sort of facial challenge is really getting this case precisely backwards. We are challenging the memorandum that exists, and the memorandum that exists says that it is the policy to exclude all undocumented immigrants based on their lack of immigration status. That is the action of the government that is challenged here.

And so it is defendants that have to somehow justify that categorical exclusion of everyone, including undocumented immigrants who undisputedly live here. The memorandum is not remotely targeted at folks who are physically crossing the border on census day or who are in a car being transported back over the border on census day. That is just not what this case is about. And those kinds of sort of fringe hypotheticals, I think it's no accident that what they're really talking about are folks who, when maybe there is a serious question as to whether they usually reside here, there could be a question as

to whether someone who arrives yesterday usually resides here. But those kinds of questions exist for folks who are undocumented, who are legal permanent residents, or who are citizens. And this case is not about that, because even defendants agree they are going to decide that millions of undocumented immigrants do live here. They usually reside here and they are going to count them and then they're going to exclude them anyway.

So that is what this case is about, and these fringe examples I think are really a red herring and get this backwards. What the memorandum is doing and declaring is directing the defendants to do what the framers forbid. The framers were very purposeful in requiring apportionment be based on living here, on your usual residence, on your abode, and you cannot ignore that and exclude people based only on a legal status that doesn't have anything really to do with whether you usually reside here or not.

And I would like to touch --

JUDGE FURMAN: This is Judge Furman. I was going to check if Judge Hall or Judge Wesley have any questions, and otherwise propose that we give Mr. Ho a little time to address the statutory arguments.

JUDGE HALL: Not me, I'm good.

JUDGE WESLEY: No, that would be fine, thank you.

JUDGE FURMAN: All right. Mr. Ho, why don't you turn

to the statutes then.

MR. HO: Thank you, Judge Furman. Dale Ho for the non-governmental plaintiffs.

13 USC 141 and 2 USC 2(a) set forth an interlocking statutory structure governing the census and congressional apportionment. The defendants have violated this statutory scheme in two distinct respects. First, the statutes require including the total population and the whole number of persons in the apportionment base. That includes undocumented immigrants, and defendants' arguments to the contrary just torture the plain language of the statute.

Second, the statutes require using the decennial census for apportionment, which in 2020 undisputedly includes undocumented immigrants. That is, even if defendants were correct that *ex ante* they have some discretion to exclude certain populations of undocumented immigrants from the census, this particular census does not exclude undocumented immigrants, and defendants are under a ministerial duty to use the actual census for purposes of apportionment.

If I could address that second argument for a moment, the text of Section 141(b) clearly provides that the Commerce Secretary in his report to the President must use, quote, "total population for the apportionment," and that calculation must be based on the decennial census. Section 2(a) provides that the President's report to Congress must similarly use the

whole number of persons ascertained under the decennial census.

Now the legislative history to 1929 Census Act I think makes very clear that once the census is complete there can only be, quote, "one mathematical answer." That's from the Senate report. So once the census is complete, the President does not have discretion *ex post* to manipulate the census data to his liking, add or subtract other kinds of data from the census count and use different kinds of calculations to arrive at a different apportionment number. The statutory and constitutional function of the enumeration is that it is used for apportionment, and if the President could simply revise or alter the census results and adjust them as he sees fit after the census is complete, there's no real limit on what he can't do, as I think Justice Thomas' separate opinion in *Utah v. Evans* goes to some length to explain why granting the President that kind of discretion would be problematic.

To Judge Furman's first question about I think resolving this case empirically on statutory grounds, the Court could certainly look at the statutory claims first. We do think, given the exigencies here and the likelihood of quick appellate review if this Court were to rule quickly, that for purposes of completeness of the record and to facilitate appellate review the better course would be to resolve both sets of claims, the statutory and constitutional ones.

JUDGE FURMAN: All right. Why don't we spend a few

minutes on the remedies and then we'll hear from defendants, unless either Judge Hall or Judge Wesley have a question on the statute.

So Judge Wesley?

JUDGE WESLEY: No, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Nothing here, thank you.

JUDGE FURMAN: All right. So I can't remember who was planning to address the remedies questions, but let me start by posing a question and whoever is addressing it can answer, which is assuming that we agree with you on jurisdiction and the merits and intend to grant some relief, do we need to address the question of whether such relief would need to extend to the President or would it not suffice to enter an injunction barring the Secretary from sharing the information with the President that he's directed to share in the memo?

And then let me actually throw out a second question that you can address in the meantime. Defendants argue in a footnote in their brief that such an injunction would violate the opinions clause of the Constitution. Could you address that as well?

MR. HO: Thank you, Judge Furman. In response to your first question, we would agree that effective relief is possible even without relief against the President, that this Court could order an injunction which enjoins the other

defendants in this case from taking any action in furtherance of the Presidential Memo's policy of excluding undocumented immigrants from the census. That would provide us with effective relief, but we do think that the better course would be to order relief against the President. Declaratory relief I think, for example, is available under Second Circuit precedent under the *Knight Institute* decision affirming declaratory relief against the President.

And with respect to injunctive relief, I would just simply say that the defendants don't deny that if the President's duties here are in fact ministerial, then an injunction would be proper, and we think that the duty that the President has that we're asserting he's violated are in fact ministerial. There is a constitutional requirement to include all people living in the United States. The President has no discretion to depart from that. And there's a statutory duty to use the census numbers for purposes of apportionment, which the Supreme Court in *Franklin* noted is a, quote, "admittedly ministerial task." So we think that relief against the President is available, and we think it would be the better course to sort of ensure the finality of relief that's effective.

To your second question, Judge Furman, I think this case could be different if the President's Memo had simply directed the Census Bureau to conduct a research assignment,

tell us how many undocumented immigrants or non-citizens there are in each state. But that's not what has happened here. What happened here is the President has declared an official policy of the United States which is unequivocal and in direct contravention of the Constitution and statutory requirements. And in that circumstance, the work that the defendants, including Congress and the Census Bureau are undertaking in furtherance of that memo, are properly enjoined. It could be a different story with a different kind of directive from the President, but that's just not the case that we're presented with here.

JUDGE FURMAN: All right. Thank you.

Unless Judge Hall or Judge Wesley want to ask anything, I think we can switch to defendants. Judge Wesley?

JUDGE WESLEY: Thank you very much.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: Thank you. We're ready to switch to defendants.

JUDGE FURMAN: All right. So Mr. Joshi, if you want to pick it up and start with the issues of standing and ripeness, please.

MR. JOSHI: Thank you, Judge Furman, and may it please the Court.

The Court should dismiss this case at the outset because plaintiffs don't have standing for any of the injuries.

So let me just take them in order. I think the apportionment injury is not imminent or even ripe for review because the memorandum asks the Secretary to transmit information and a second set of numbers, if you will, to the extent feasible and the maximum extent feasible. And the Secretary has not yet determined what is feasible or presented any information breaking down what categories of aliens who don't have lawful status under the INA could be accounted for and excluded from the enumeration that would serve as the apportionment base.

In fact, I think plaintiffs in their complaint, and I am looking here at paragraph 175 to 179 of the NGO plaintiffs, amended complaint 137 to 141 of the governmental plaintiffs --

JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. Are you shuffling papers?

MR. JOSHI: No, I'm not.

JUDGE WESLEY: Someone is shuffling papers. If you could stop.

JUDGE FURMAN: Judge Furman here. Just a reminder, if you're not speaking -- and Mr. Joshi should be the only one speaking at the moment -- place yourself on mute, please.

MR. JOSHI: Thank you, this is Sopan Joshi again.

So I think plaintiffs in their complaint have actually alleged that it will prove completely infeasible to count and exclude such aliens, in which case the two sets of numbers the Secretary will present will be the same and there will be no

apportionment injury at all. So in some ways --

JUDGE WESLEY: Mr. Joshi, this is Judge Wesley. I don't know that that will deter the Secretary of Commerce. It may present a difference of opinion with regard to whether the numbers are in any way reliable, but isn't the law issue a little bit more distinct already? What is indefinite about the posited intent to exclude illegal aliens from the delivery of numbers to the Congress? It's the policy of this administration. What is indefinite about that? What's so indefinite about that?

MR. JOSHI: So your Honor, I think what is indefinite --

JUDGE WESLEY: It sounds definite to me.

MR. JOSHI: I'm sorry, I didn't catch that last part.

JUDGE WESLEY: I said it sounds definite to me.

MR. JOSHI: So the memorandum by its own terms and the policy by its own terms is to exclude such aliens, quote, "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." So the memorandum statement of policy is itself self-limiting, and it includes a condition of feasibility that the Secretary needs to determine first.

JUDGE WESLEY: Let me ask you this: Is it your view that the Secretary could get a number from the Department of Homeland Security as a number of people currently subject to

orders of removal in which their appeals have been exhausted from the Bureau of Immigration appeals and/or any petitions before the circuits, and that number of people, those people still remain in the United States, could the Secretary get that number and then deliver it to the President?

MR. JOSHI: So my understanding is yes, under the Executive Order 13880.

JUDGE WESLEY: And in your view, that would not violate Section 2(a), is that your view?

MR. JOSHI: So 2(a), we think the substantive standard encompassed in 2(a) is identical to the constitutional standard.

JUDGE WESLEY: So your answer is no, it doesn't violate it then, is that it?

MR. JOSHI: If hypothetically that were what were done then that may well be the case. I think our point on standing --

JUDGE WESLEY: Stick with me on the question for a few minutes, Mr. Joshi. Is it your view that that would not violate Section 2(a)?

MR. JOSHI: Yes, that would be a proper exercise of executive discretion to --

JUDGE WESLEY: So let me ask you this: Have you been in touch with the Secretary of Commerce to determine to what extent he has at the present time formulated methodologies with

regard to counting and those other agencies that he's contacted persistent to the President's directive?

MR. JOSHI: The Secretary of Commerce has not yet stated what he will or --

JUDGE WESLEY: I didn't ask you that question. I asked if you have been in touch with him before this oral argument to determine how far along that was such that you could report to this Court how much more definite the Secretary was with regard to his ability to fulfill the order of the President?

MR. JOSHI: So we have been in touch with the Commerce Department but we have not received any definite information as to what will or won't be feasible at this time.

JUDGE WESLEY: You received no information -- you're telling me right now as an officer of this Court you have received no information with regard to any particular set of figures that the Secretary proposes to deliver to the President?

MR. JOSHI: That is correct. As I stand here today I have not received that.

JUDGE WESLEY: All right. Thank you.

MR. JOSHI: And I think, given that uncertainty, we think the dispute right now isn't ripe because we dispute plaintiffs' characterization of the memorandum as being --

JUDGE WESLEY: Well, this is Judge Wesley again. Did

you receive an estimate as to when you might receive that information?

MR. JOSHI: No, I have not, your Honor.

JUDGE WESLEY: Did you ask? The issuance of the order is the person who determines the definiteness of this, according to your theory. It's kind of easy to hide the ball, isn't it?

MR. JOSHI: Fair enough, your Honor, but I point out the Supreme Court's decision --

JUDGE WESLEY: The uncertainty can't be self-induced, can it?

MR. JOSHI: Well, it can, in this sense, and let me explain, if I might: The Supreme Court in *Franklin* made very clear that the Secretary could deliver numbers for the very first time at the deadline, December 31st, and the President could turn around and say, "No, I disagree. I have a policy disagreement with whom you decided to count or not count in this enumeration, go back and redo the numbers."

JUDGE WESLEY: I will absolutely give you that, Mr. Joshi. In fact, quite frankly, I agree with you. But what about the census count itself, and what about the immediate effect with regard to the diminution in the overall numbers and the effect that that then has on agent localities, the types of injuries that flow from that you yourself, your side doesn't even contest?

MR. JOSHI: So I dispute that we don't contest it. So if we're moving to the census count injury, I think first and foremost it is simply not traceable or redressable under *Clapper*. As even the citizenship question case last year and even right now I think we all agree that that census count injury would have to be traceable to the memoranda. And so it's incumbent on plaintiffs here to identify some subset of people who would not have been chilled and were not chilled from answering the census between April 1st and July 21st, then became chilled on July 21st after the memorandum was issued, and then will be unchilled in the next 27 days by an order of this Court that the government would vigorously contest and that would remain reviewable on appeal.

JUDGE HALL: This is Judge Hall. How many people have to be unchilled in order for your hypothetical or your discussion to bear fruit and provide standing? One? If the plaintiff showed one person was, "Ah-hah, I read this and now I will answer the census," is that enough?

MR. JOSHI: It would have to to be non-speculative, whatever the number is.

JUDGE HALL: One seems to be pretty non-speculative.

MR. JOSHI: But you would then, I would assume, have to identify it and provide a reason and make sure that that is actually fairly traceable to the memoranda. It can't just be self-inflicted, as I think *Clapper* tells us. And *Clapper* also

tells us that governmental actions that don't directly, quote, "regulate, constrain or compel any action" are simply not the source, as a matter of law, as being the fairly traceable source of an alleged injury.

JUDGE FURMAN: This is Judge Furman. Didn't you effectively make and lose that argument in the citizenship question litigation, that is to say, the theory of harm in the citizenship question litigation was that people would not respond to the census out of essentially fear that their identities would become known to the government. That was based on a misunderstanding or a misimpression that census responses and census data would be available to immigration authorities or the like, that is to say it was premised on a misunderstanding. Yet both I and the Supreme Court found that because there was a predictable effect on the third parties that ultimately caused harm to the plaintiffs that that sufficed for standing. So why does that argument not hold here?

MR. JOSHI: For two reasons, Judge Furman. First is that I think in that case it was still the question was: Is it traceable to the citizenship question's inclusion on the form? Here it's: Is it traceable to the memoranda? And the difference between those two is that the census count injury right now is happening in the middle of the census. So you would have to show someone who was not chilled from April 1st

to July 21st and then became chilled, and then on redressability would become unchilled in the next 27 days, even though the order would still remain reviewable on appeal. That's the difference.

JUDGE FURMAN: Let me interrupt for a second. The President made the decision to wait until July 21st to issue this memorandum. If he had issued it on March 30, prior to census technically beginning altogether, would you still be making this argument, or is this argument essentially dependent on the fact that the President, for whatever reason he may or may not have had, waited until the census was near over? And indeed, the Census Bureau decided to shorten the period of the census. So in other words, can it be that the President's decision to essentially truncate the amount of time that is remaining with this memorandum in place, that that undermines the ability of the plaintiffs to challenge this?

MR. JOSHI: I will directly answer that question, but let me just recite the premise a little bit. Under *Franklin* he could have done this in the ten days between December 31 and January 10. In fact, I would say it was laudable this was announced in advance and allows the Secretary to do work in a less expedited timeframe. And *Franklin* makes clear that that's a perfectly permissible way to go.

JUDGE FURMAN: Mr. Joshi, that's not what he did, and also had he done that, had he waited until October 1st when the

census is technically over, there would have been no argument that this could affect the ongoing census count itself. Instead, he made the decision to issue this memorandum with essentially only one month remaining, but time remaining nonetheless. So we're now confronted with declarations that say this is having a demonstrable effect on the ongoing census count. You haven't countered those declarations. You didn't ask for a deposition of those witnesses. Are we not required, in essence, to rely on that, that it is having ongoing harm?

MR. JOSHI: No, for two reasons. One, to answer your earlier question, I think we would be making the same traceability argument in the sense that there's a meaningful difference here between someone who looks at the citizenship question and being asked to answer it, and then as a result chooses not to answer the question and to throw away the form, and someone who is looking at the census form and is concerned about an entirely different document that deals with post-processing of the census data.

But to your second question, in terms of the declarations, I do think we have evidence in the record. Dr. Abowd's declaration helps us in two ways: Number one, on the summary judgment posture, if that's what you're considering right now, you have to take the facts in the light most favorable to us. And two, Dr. Abowd's declaration makes clear that when the census citizenship question was actually put to

the test by the bureau, and plaintiffs' experts don't even address this study, it showed no statistically significant decrease in response rates. So we think if you take that in the light most favorable to us *a fortiori* the memorandum, which is not even on the census, it's a completely separate statement of policy, will not result in a substantial decrease in non-response rate, which then shows that the census count injury won't occur and is not traceable to the memorandum.

And of course I think as your Honor's questions earlier on the diversion of resources under *Clapper* suggest, we agree that you can't have a self-inflicted diversion of resources injury if that diversion of resources are not intended to counter something that is itself not a cognizable injury. And here, as the census count injury is not cognizable because it's neither traceable nor redressable, so too the diversion of resources falls with it.

JUDGE FURMAN: This is Judge Furman. Let me follow up on that particular point. Would that not render *Havens Realty* essentially a dead letter or a null set? That is to say, how could one ever have organizational standing by virtue of the diversion of resources in the absence of another form of injury that would itself suffice for standing purposes?

MR. JOSHI: I don't think so, your Honor, for a couple of reasons. One, it's not that you have to have suffered the other injuries, it's that the other injury, had it

materialized, would be cognizable, so hence the diversion. You're not penalized for having prevented that. And I think that's the principle that *Clapper* was getting at. It doesn't undermine *Havens* because remember in *Havens* they had already suffered the injury and then they were expending resources to try to prevent the additional suffering of the injury, including the informational injury in *Havens*. So *Havens* is perfectly consistent with *Clapper*, and both of those cases together do not support a diversion theory here.

Now if I might move on to -- I think that addresses the standing and the ripeness issue, so I will move on to the merits unless there are further questions on it.

So on the merits we're considering, of course, both plaintiffs' summary judgment motion and our motion to dismiss. So at the threshold, which I think is proper to start with, we believe all the claims against the President and all of the APA claims should be dismissed under *Franklin*; the APA claims because there's no final agency action yet and the President is not an agency, and then the claims against the President I suppose we can talk about later in the relief, but under *Mississippi v. Johnson* and under *Franklin* there simply can't be the sort of relief against the President in the conduct of his official act.

JUDGE FURMAN: Mr. Joshi, could I interrupt and ask you: Can you address the facial challenge question? In your

brief you argue that it's the plaintiffs' burden to demonstrate that, in essence, any or every illegal alien who would not be counted, that that would be unlawful. Doesn't that get it backwards, as Ms. Vale said? Isn't the question whether there's anyone under the President's memorandum who would be excluded who it would be unlawful to exclude; and if there is, then the memorandum is either in violation of the statute or the Constitution?

MR. JOSHI: With respect, I disagree, as you might have expected. The memorandum itself is self-limiting. It says to the maximum extent feasible and consistent with the discretion delegated to the executive branch. And so as I said when we were discussing ripeness, plaintiffs' choice to challenge it right now means they have to show that if the Secretary were to find it feasible to exclude only those aliens without lawful status who have been paroled while waiting for their removal to be effectuated, if that's all he finds then that would be the question before the Court, whether that is consistent with the discretion delegated to the executive branch. By bringing the challenge now before we know what is feasible and what the President has determined is within the extent of his discretion, they are bringing a facial challenge, and they have to show that there would be no set of such alien whom the President could exercise its discretion to exclude from the apportionment base if the Secretary were to find it

feasible.

So it really is a facial challenge, and I think *Texas v. United States* is most on point. There Texas passed a statute and what they wanted was to say: Look, which way we apply this statute, there would be no circumstances under which it would affect voting, and therefore we don't need Section 5 preclearance for it. And the Supreme Court said: No, we're not going to evaluate that right now, because I think the quote was, "We don't have sufficient confidence in our powers of imagination to affirm such a negative, and that the operation of the statute is better grasped when viewed in light of a particular application." So too here, we need to first see the application of this memorandum, we need to see what the Secretary finds is feasible and then see exactly what the President then excludes from the apportionment base. And then you will have an actual target, an actual application to evaluate. So I disagree.

JUDGE FURMAN: On the merits -- this is Judge Furman -- the Court has repeatedly looked to history in forming its understanding of constitutional provisions and, for that matter, statutory provisions. Can you identify any historical instance where the executive branch or the legislative branch or the judicial branch, for that matter, had taken the position that it would be lawful to exclude illegal immigrants from the census count or the apportionment base?

And I would note I think the Department of Justice took the position that it would be unlawful in the 1980 *FAIR* litigation. In the *Ridge v. Verity* litigation in 1989 there is a six-page fairly thorough letter from an assistant attorney general in the Department of Justice in 1988 commenting on a bill that would have excluded illegal aliens from the reapportionment count and explicitly took the position that would be unconstitutional. There was a 1989 letter when the current Attorney General was the assistant Attorney General for the Office of Legal Counsel reaffirming that position. There's an opinion of the Senate legal counsel in 1929, the year that Congress passed the sort of modern Census Act, stating that it would be unconstitutional. Is there any instance, any support for the proposition that you are pressing here today in the historical record?

MR. JOSHI: We have not been able to identify any. But in *Franklin* there was a nearly unbroken 180-year history of not including service members in the count, and nevertheless Secretary Mosbacher made a different determination. And he did so in the wake of at least nine bills that had been presented in the 100th and 101st Congresses proposing to include such service members, none of which made it very far. And nevertheless, he exercised his discretion to do so, and the President agreed, and the Supreme Court upheld that decision.

In this case I think what we point to is the original

meaning of "inhabitants" and the legal concept of "usual residents" that the Supreme Court has explicated that we say could be read, and in fact is most fairly read to exclude aliens who don't have permission to stay and settle in the country, that's the definition of "inhabitant," or who don't have enduring ties because they could be removed at any time by the sovereign.

On the other hand, I agree with you, plaintiffs' best argument is history, and that cuts the other way. But I think in the end when you compare those two together what it really means is that the concept of persons in each state or inhabitants or usual residents or those with allegiance or enduring ties, all of these concepts are not particularly well defined and therefore leave a considerable amount of room to the executive to exercise his discretion.

Now the fact is the executive did not exercise that discretion in the way that the memorandum here is exercising it, but that doesn't make the exercise unlawful. There's no laches on executive discretion or, for that matter, congressional discretion over defenses. Of course the executive branch's nearly unlimited discretion -- to use the phrase in *Wisconsin* -- over the census operation is by delegation from Congress. And Congress, of course, can take back that delegation in whole or in part, temporarily or permanently, at any time. So if this memorandum -- if the

President acts in accordance with this memorandum and delivers the apportionment to Congress on January 10, they can disapprove it. They can pass a bill and they can exercise the discretion that the Constitution grants them.

JUDGE FURMAN: Mr. Joshi, this is Judge Furman. Hasn't Congress already exercised that discretion in US Code Section 2(a), that is, by directing the President to use the whole number of persons in each state, quote, "as ascertained under the decennial census of the population" to determine apportionment? And by definition isn't it the case that if the President uses anything other than the number given to him pursuant to the residence rule, that is, subtracting any category of illegal immigrant from that number, isn't it by definition not consistent with that statute?

MR. JOSHI: No, for several reasons, and let me walk through them, if I might. First, the substantive standard in 2(a) simply echoes the constitutional text, and I think it would be a mistake to read it as being anything different from the constitutional text, as far as the substantive standard.

As far as like whom to count, I think, with respect, that just begs the question here, because remember in *Franklin* the Supreme Court was very clear that the enumeration, the thing that is the enumeration used to calculate the apportionment is not final until the President says it is. And so if you think about a case like *Franklin*, if the Secretary

delivers the census result that counted all the people he thinks should have been counted to the President, and the President turns around and says, "No, I disagree" -- so let's say Secretary Mosbacher in *Franklin* had submitted a census that included the overseas service members -- as he did, in fact -- and then had President Bush turned and said, "You know what? I disagree with that policy. I'm going with what we have done for 180 years, with very few exceptions, I don't want to include them at all," Secretary Mosbacher would have gone back within those ten days, subtracted those service members, sent the new results back to the President, and he would have used that in the apportionment. That's exactly what is happing here. So it begs the question to say you're taking the --

JUDGE WESLEY: Mr. Joshi, there's a significant difference though. The Secretary had made the allocation determination and had counted service members and decided where they were to be counted under the census. Here, the stated policy is to draw a number outside of the census from data not collected by the census itself and reduce the allocation as determined by the census. This is not the President disagreeing with some data that is within the census, this is the President reducing the census. The census does not count illegal aliens, does it?

When I filled out my questionnaire, it didn't ask me if I was an illegal alien.

MR. JOSHI: No, I don't understand --

JUDGE WESLEY: This is completely different. This isn't *Franklin v. Massachusetts*, and I wonder why we have to wait. The stated purpose is to draw a number outside of the census and take it from the number that is produced by the Secretary. It's not a disagreement with what the Secretary provides to the President and then an alteration by the President. He can do that, I agree with you, that's *Franklin v. Massachusetts*, and it's not ripe until he makes that decision. This is the stated policy that illegal aliens are not to be counted, and yet they are counted, and now the President is trying to find a way to take them out of the number, but not from the data collected by the Census Department, correct?

MR. JOSHI: No, I don't agree with that.

JUDGE WESLEY: Where is he getting the data from? Where's he getting the data from? He's not getting it from Census Bureau data, is he?

MR. JOSHI: With respect, your Honor, the Census Bureau maintains and gets administrative records that Congress has directed that they do to the maximum extent possible.

JUDGE WESLEY: Just answer my question, with respect, please. Is the Census Bureau maintaining records in the allocation and enumeration of illegal aliens?

MR. JOSHI: It is attempting to collect the

information.

JUDGE WESLEY: I didn't ask you that, I said: Is it maintaining records? I'm not asking whether it's asking other agencies. Did it count illegal aliens as part of the census?

The answer is yes.

MR. JOSHI: So far, yeah.

JUDGE WESLEY: Right. Because they didn't ask anybody if you were an illegal alien, did they?

MR. JOSHI: Correct.

JUDGE WESLEY: So now they're looking to figure out if there's other data outside of the census to provide to the President from which he could then deduce that there are illegal aliens within the census count, is that correct?

MR. JOSHI: That is correct.

JUDGE WESLEY: And that is not *Franklin v. Massachusetts*, is it?

MR. JOSHI: I disagree there.

JUDGE WESLEY: It is? You disagree why? Because in *Franklin v. Massachusetts* the service members were counted, it was the question of where they were to be allocated, wasn't it?

MR. JOSHI: So two responses to that, your Honor, if I might, and I hope I can clear up some misunderstandings here. Number one, the decision and the discretion that we're talking about here is always binary, include or exclude, and it can't possibly be that the executive discretion works only one way

like a ratchet. The decision to include is just the same kind of exercise of discretion as the decision to exclude.

JUDGE FURMAN: Well, Mr. Joshi, let me --

MR. JOSHI: Sorry, I just want to clarify something, if I might. I really apologize, but it's important.

In *Franklin* there was not a census taken of those overseas service members. There was going to be an attempt to do it and then DOD said in fact it wound up being infeasible, so they counted those service members both to include in the first place and then to allocate based on separate records outside the census. So I disagree that it's anything unusual here, it is just like *Franklin*. I just wanted to clear up that misunderstanding.

I'm sorry, Judge Furman.

JUDGE FURMAN: Well, perhaps that answers the question, but I wanted to tether it to language of Section 2 which requires the President to use the whole number of persons as ascertained under the census. Isn't the case if the whole number is determined by taking the census number, that is the number as ascertained under the census, and subtracting a number based on something totally unrelated to the census, that it is no longer using the whole number of persons as ascertained under the census?

MR. JOSHI: No, for the same reason I think I just mentioned in *Franklin*. If you're taking the census and then

adding, based on administrative records overseas service members, you've done the same thing. Likewise, in *Utah v. Evans* you're taking the numbers from the census and then you're looking at gaps and then you're just imputing people into it based on other administrative records and statistical formulas, et cetera.

JUDGE FURMAN: But Mr. Joshi, you've made two arguments repeatedly in your briefs. One is that the census has never been conducted solely on the basis of questionnaires, that the Census Bureau uses other things, administrative records, imputation, et cetera, to produce the whole number of persons. So in essence that's what happened in *Utah v. Evans* and that's what happened in *Franklin*.

The second argument that you've made is the President's memo has nothing to do with the census, that the census is being conducted as it was prior to July 21st, and that the Census Bureau will produce a whole number of persons as ascertained under the census pursuant to the residence rule and provide that information to the President. Doesn't it follow *a fortiori* that if the Secretary provides another number that it is not a number that is ascertained under the census?

MR. JOSHI: No, it doesn't, with respect, and here's why: If this had proceeded as if under *Franklin*, let's say the Secretary applies the residence criteria, delivers that number to the President, the President turns and says, "I disagree, I

want you to give me a new number, to the maximum extent feasible and consistent with the discretion delegated to me, to exclude aliens who don't have lawful status under the INA." The Secretary goes back, redoes the numbers using the administrative records, just like in *Franklin* using the DOD records, sends the new number back to the President. The President says, "Ah-hah, yes, I like this, this is the now the enumeration and the apportionment." What *Franklin* says is that's when you get the actual census enumeration and apportionment. The only difference here is that the Secretary is providing both numbers in parallel rather than seriatim. That's the only difference. But I don't think that's a difference that violates Section 2(a).

JUDGE FURMAN: Unless Judge Wesley or Judge Hall have other questions on the merits, maybe you should have a brief word on remedies and then we'll go back for a brief rebuttal from plaintiffs.

Judge Wesley?

JUDGE WESLEY: I'm fine, thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: I'm fine as well.

JUDGE FURMAN: Why don't you wrap up, Mr. Joshi, by addressing the remedies question.

MR. JOSHI: I'm happy to do that. If I might just add one sentence, I think since we do have our motion to dismiss

here as well, I would just say that the Section 195 sampling claim should be dismissed because the memorandum says nothing about sampling. The Tenth Amendment claims I think should be dismissed because it doesn't coerce or even ask States to do anything. And we think equal protections claims are deficient under the *Regents* case because it tends to bootstrap statements that are far removed in time and context.

So on remedies, as I mentioned earlier briefly, we think there's no relief possible against the President under *Franklin* and under *Mississippi v. Johnson* because there cannot be such relief against the President in the conduct of his official duty.

Now there is an open question, and I disagree with my friend Mr. Ho that we conceded, but there is an open question as to whether such relief could lie for purely ministerial acts. But this is not ministerial, as *Franklin* makes clear. Although the mathematical formula might be ministerial, picking what number you plug into that formula is certainly not ministerial, and that's what we have here. We're picking what number goes in based on a policy judgment about who should be included. So under those cases, no relief against the President.

JUDGE FURMAN: This is Judge Furman. Does that not open the door to precisely the political chicanery, to use Justice Thomas' language, that the Census Act was prevented to

prevent? In other words, my understanding of the history if not the language of the statute is that Congress wanted this performed by a constitutional officer but effectively limited that role to one that could be done with simple arithmetic.

If you're saying that as a matter of policy the President could basically decide only people from red states count in the census and that's a policy decision, doesn't that precisely result in the political chicanery that the act was intended to prevent?

MR. JOSHI: I disagree for a couple of reasons. One, I think there's a difference between determining the enumeration based on policy judgments. And then the second step from enumeration from apportionment, there is a different policy judgment that's involved there, and I think the *Department of Commerce v. Montana* case probed that aspect. What Congress has done is exercised its discretion and made the policy judgment as to that second theme, as to the enumeration to apportionment calculation, but it is still left to the President the discretion on policy for determining the enumeration itself, as *Franklin* and *Utah v. Evans* makes clear.

But there are also -- as we said, the President has discretion, and *Wisconsin* calls it virtually unlimited, but it is not unlimited, and it might be limited by other constitutional doctrines, of course. So if the President says, "I refuse to count any one of a certain race or religion," we

think that would be not within his discretion. That's far removed from, obviously, the situation here.

Now in terms of the final question that the Court issued, which is if there is no relief against the President could there be any other effective relief, I think that is a difficult question. But ultimately we agree that in *Evans* the court found it sufficient to presume that the President would be substantially likely to abide by an injunction against the Secretary, even though he wouldn't be bound by it, and nothing in the record here would cast doubt on that presumption. So although the government obviously already did the opposite in *Evans* and *Franklin*, we think this Court would just follow the course there. But it is important to say, in answer to the Court's question, assuming you were to get this on the threshold issue then the merits, which we don't think you should, what such relief might look like.

And I think it's important to note that any such injunction, preliminary injunction against the Secretary, could not prevent him from providing the information that the memorandum asks him to provide. In fact, if you read the actual memorandum, what it directs the Secretary to do is, quote, "The Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise discretion to carry out the policy."

And under the opinions clause, the President can demand in writing the opinion on any subject relating to the duties of the office, and this would plainly qualify under that.

JUDGE FURMAN: Mr. Joshi, let me ask you one final question, unless my colleagues have a question on that. You invoke the opinions clause in a footnote in your brief. I think this Court, the Second Circuit and the Supreme Court have generally taken the view that that's not sufficient to present an argument. Why should we not view that argument as having been waived?

MR. JOSHI: Because, your Honor, first of all, we did raise it in our affirmative motion. It was a combined brief, of course, so it's hard to separate.

JUDGE FURMAN: In a footnote.

MR. JOSHI: That is true, it was in a footnote, but we didn't take necessarily plaintiffs to be asking to prevent the transmittal of even information, we take plaintiffs to be asking -- and we think an injunction would have to be so limited to simply saying that the second set of numbers cannot properly serve as the enumeration for the apportionment purposes. That would be the limits of what the injunction could do. It couldn't actually prevent the Secretary from doing the work to provide the information.

In this respect, Judge Furman, I respectfully point to the decision in the prior census litigation. I think at the

end of that trial there you were clear in your order, or I thought it was, that the government could not actually include the citizenship question on the census questionnaire, but you clearly said that we were not enjoined from taking other preparatory steps to prepare to include it as long as we didn't take that final step. And I think that would be analogous to this situation here.

And really I think I would like to close by saying an injunction that said: Secretary, the second set of numbers called for by the memorandum would be unconstitutional or *ultra vires* if it were to serve as the enumeration number for purposes of the apportionment base. I think just saying that demonstrates the problem with this case, which is you don't have the second set of numbers and you couldn't possibly say exactly what the problem with it is.

And I think that just underscores why this case is not ripe at this moment. We should wait to see what is feasible, what those numbers are, and then the case can proceed exactly as *Franklin* proceeded, exactly as *Evans* proceeded, exactly as *Wisconsin v. New York* proceeded. And the one case that plaintiffs have identified that was litigated beforehand was *Department of Commerce v. House of Representatives* dealing with statistical sampling which expressly provides a cause of action pre-enumeration.

So for all those reasons we think you should dismiss

the case at the threshold, but at a minimum no relief against the President and only limited preliminary injunctive relief against the Secretary if you disagree.

THE COURT: Thank you, Mr. Joshi.

We'll hear briefly from Ms. Vale and/or Mr. Ho, but I emphasize "briefly."

MS. VALE: Yes, your Honor, this is Judith Vale. I will try to be brief.

First, I do want to touch on the point that another reason why the memorandum is both unconstitutional and a violation of the statute is that defendants are untethering the apportionment from the actual enumeration. That is what they are doing, and it is what they have said they are doing. Director Dillingham in his sworn testimony to Congress said that the memorandum has nothing to do with our operation right now with the census, we're counting everybody, it has to do with the tabulation that has been requested on apportionment.

In the joint letter that we submitted earlier, defendants also said, unlike the citizenship question, plaintiffs are not challenging a procedure that will be used in the actual census but an apportionment number that will be chosen by the President after the census is complete. And that is quite different from what happened in either *Franklin* or *Utah* where it is true that in *Franklin* and *Utah*, and during the census process of counting who usually resides here, the Census

Bureau does use information from administrative records or imputation, but that was as part of deciding who usually resides here.

And that's not what is going on here. That is not what defendants have represented that they are doing. They are going to do the count, they are going to find out who usually resides here. They are going to count undocumented immigrants as usually residing here using not just the questionnaire but all of the census processes that they use, and then when that is done they're going to give that number to the President. And separate from that, they are getting another number that the President will use to subtract. That is unconstitutional because I think it is undisputed that the actual enumeration has to be the basis for apportionment, and it also violates the statute.

The second point I just want to hit quickly is on the claim about this being infeasible, and in particular that plaintiff has said it might be infeasible. What we said is that we don't think defendants can do this accurately. We don't think they can actually accurately do a head count of every single undocumented immigrant. But doing it, implementing it and doing it well are not the same thing. And I think we have every indication from both the citizenship question case and what defendants have said so far that they will go forward even if there are serious questions about

whether their numbers are accurate. They said they might only abandon course if it's infeasible. They have not said they would abandon course if there were questions about accuracy.

In any event, it's really rank speculation from defendants to suggest that they are actually going to give the President some small subset of numbers rather than do everything that they can to count as many undocumented immigrants as they can. And they have provided no proof, no information whatsoever to suggest that they are going to provide a subset of numbers. And that absence of proof is entirely self-inflicted during the time that's gone by when presumably the Census Bureau has been working on this, as Dr. Abowd and Director Dillingham have said. They have provided no evidence whatsoever to suggest that what is really going to happen is a smaller number.

And so the question of what the memo says right now on its face is that the decision of the President as of right now is to exclude all undocumented immigrants. And even if that is some sort of facial challenge, which we obviously disagree with, there is no set of circumstances under which excluding undocumented immigrants based solely on their immigration status rather than their usual residence is constitutional or lawful.

JUDGE FURMAN: Thank you, Ms. Vale.

MS. VALE: The last thing I was going to say was just

on ripeness that we should also balance not just the hardship to the plaintiffs but the fact that there is no hardship to defendants from resolving this now and getting it right the first time.

JUDGE FURMAN: Thank you, Ms. Vale.

Let me check with my fellow panelists to see if they have any final questions, and otherwise we'll wrap up. Judge Wesley?

JUDGE WESLEY: No, thank you very much, counsel. Thank you all, counsel. I gave you a rough time at times but I appreciate your honest answers. Thank you.

JUDGE FURMAN: Judge Hall?

JUDGE HALL: No. My thanks to counsel as well, but no further questions. Thank you.

JUDGE FURMAN: In that case, let me close by thanking counsel as well for your very helpful briefs and oral argument, and we will reserve decision and try to give you a ruling as soon as we can. And with that, I wish everybody a good day and stay safe. Thank you very much.

(Adjourned)