UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. 1:20–cv–02023–CRC–GGK–DLF

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

ARGUMENT 1

I. PLAINTIFFS MISCHARACTERIZE THE PRESIDENTIAL MEMORANDUM 1

II. PLAINTIFFS HAVE NOT SATISFIED ARTICLE III'S REQUIREMENTS 5

A. Plaintiffs' Claims Are Not Ripe 5

B. Plaintiffs Do Not Have Standing 9

1. Plaintiffs' Alleged Apportionment Injuries Are Too Speculative to Confer Standing 10

2. Plaintiffs' Allegations That the Presidential Memorandum Will Reduce Participation in the 2020 Census Fail To Establish Standing 11

3. Plaintiffs Lack Standing Based on Supposed Dignitary Harm 13

4. The Organization Plaintiffs Fail To Establish Standing 14

5. The City Plaintiffs Lack Standing 14

III. PLAINTIFFS FAIL TO STATE A CLAIM 15

A. Plaintiffs Have Failed To State an Apportionment Clause Claim (Count I) 15

B. Plaintiffs Have Failed To State an Equal Protection Claim for Vote Dilution and Representational Injury (Count II) 19

C. Plaintiffs Have Failed To State an Equal Protection Claim for Invidious Discrimination (Count III) 20

D. Plaintiffs Have Failed To State an *Ultra Vires* Claim (Count IV) 22

E. Plaintiffs Have Failed To State a Claim for Lack of "Actual Enumeration" or Unlawful Statistical Sampling (Count V) 26

F. Plaintiffs' Demands for Relief Against the President Must Be Dismissed 28

IV. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF 29

CONCLUSION 30

ARGUMENT

I. PLAINTIFFS MISCHARACTERIZE THE PRESIDENTIAL MEMORANDUM

In Plaintiffs' telling, the Memorandum directs the Census Bureau "to exclude every single undocumented immigrant from the apportionment base." Doc. 66 ("Pl. Opp.") at 6; *see also, e.g.*, Doc. 28 ("Am. Compl."), ¶ 2.[1] That is not an accurate characterization of the Memorandum. Plaintiffs do not dispute that "the Court should not accept an allegation as true when it is flatly contradicted by a document incorporated into the Complaint," Doc. 60 ("Def. Mem.") at 22,[2] and here, the actual Memorandum, as written and as published in the Federal Register, flatly contradicts Plaintiffs' account.

In reality, the Memorandum—in no fewer than four places—conditions its implementation of the stated policy: (i) to the extent feasible; (ii) to the extent practicable; (iii) to the extent afforded by the President's discretion; and (iv) only as consistent with applicable law:

- "[I]t is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status . . . *to the maximum extent feasible and consistent with the discretion delegated to the executive branch*."
- "I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, *to the extent feasible and to the maximum extent of the President's discretion under the law*."
- "[T]he 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 the President's discretion to carry out the policy set forth in . . . this memorandum."
- "This memorandum shall be implemented *consistent with applicable law* . . . ."

---

[1] Plaintiffs have since amended their complaint for a second time, Doc. 70, solely to add additional municipal plaintiffs, *see* Doc. 69, and without adding or modifying any substantive allegations. For consistency with the parties' earlier briefing, Defendants continue to cite the First Amended Complaint, Doc. 28.

[2] Unless expressly included in a quotation, all internal quotation and alteration marks and citations have been omitted.

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 21, 2020) (emphases added).[3]

Plaintiffs deride these express, repeated conditions—three of which are made in the same breath as the statement of policy and the actual directive—as mere "savings clause[s]." Pl. Opp. at 5. In fact, they are part-and-parcel of the Memorandum. And because implementation of the Memorandum is subject to current unknowns (feasibility and practicability) and is conditioned by other factors (legality and the extent of the President's discretion), Plaintiffs "'must establish that no set of circumstances exists under which the'" Memorandum "'would be valid.'" *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)).

Allbaugh is directly on point. That case concerned an executive order that directed that it "be applied only 'to the extent permitted by law.'" *Id.* (quoting executive order). As do Plaintiffs here, the *Allbaugh* plaintiffs "raise[d] the prospect that, notwithstanding the President's instruction that the Executive Order be applied only 'to the extent permitted by law,' a particular agency may try to give effect to the Executive Order" in a manner that was not, in fact, consistent with law. *Id.* The D.C. Circuit: (i) flatly rejected the plaintiffs' bid to disregard the express limitation found within the executive order, explaining that "[t]he mere possibility that some agency might make a legally suspect decision . . . does not justify an injunction against enforcement of a policy that, so far as the present record reveals, is above suspicion in the ordinary course of administration," *id.*; (ii) made clear that the

[3] Earlier today, Plaintiffs filed a "notice of supplemental authorities," three of which "authorities" supposedly stand for the proposition that "the risk of [the Memorandum's] implementation is substantial." Doc. 73 at 1–2. To be clear, "the Administration intends to vindicate [the President's] policy determination before the Supreme Court and implement the President's policy decision." The White House, Statement from the Press Secretary (Sept. 18, 2020), Doc. 73–1. And that implementation is subject to the Memorandum's express conditions. *See also id.* ("The President properly determined that illegal aliens should be excluded from the apportionment base *to the maximum extent feasible and consistent with the discretion delegated to him by law*.") (emphasis added).

plaintiffs' challenge was facial in nature, *id.* (quoting *Flores*, 507 U.S. at 301); (iii) explained that "[i]n the event that an agency does contravene the law *in a particular instance*, an aggrieved party may seek redress through any of the procedures ordinarily available to it," *id.* (emphasis added); (iv) noted that the plaintiffs' concerns about "'tight and critical timeframes'" "provide[d] [the Court] with no warrant to relieve the plaintiffs of their burden in this facial challenge," *id.*; and (v) reversed the district court and vacated its injunction of the executive order's enforcement, *id.* at 36. The conditions in the Memorandum are much more detailed than those in *Allbaugh* so, *a fortiori*, *Allbaugh*'s precise analysis should apply equally here.

In a bid to avoid their "heavy burden" on their facial challenge, *Daskalea v. Wash. Humane Soc'y*, 577 F. Supp. 2d 82, 88 (D.D.C. 2008), Plaintiffs lean on the *New York* panel's bare facial-challenge analysis, and the single, divided opinion—*City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018)—on which the panel relied. Pl. Opp. at 5 (quoting *State of New York v. Trump*, No. 20–cv–5770, Doc. 64, slip op. at 61 (Sept. 10, 2020) ("*New York*, slip op.");[4] citing *San Francisco*, 897 F.3d at 1240); *see id.* at 16–17. But the rationale of *New York* was that the usual standard for facial challenges does not apply to a claim that the "President has exceeded the authority granted to him by Congress." *New York*, slip op. at 71 n.16. That is incorrect; the Supreme Court has already held that a facial challenge contending that a regulation "exceeds" the "authority" of an Executive Branch official must "'establish that no set of circumstances exists under which the regulation would be valid.'" *Reno v. Flores*, 507 U.S. 292, 300–01 (1993). The *New York* court provided no justification for its upside-down suggestion that a facial challenge contending that *the President* exceeded his authority should be held to

[4] Defendants recently appealed the *New York* decision to the Supreme Court. *See Trump v. State of New York*, No. 20–366 (S. Ct. docketed Sept. 22, 2020). Defendants' Jurisdictional Statement, filed in the Supreme Court on September 22, 2020, is available on this Court's docket at Document 73–2.

a *less* demanding standard. To the extent that *New York* suggests otherwise, it contravenes Supreme Court precedent.

San Francisco likewise is of no help to plaintiffs because it is readily distinguishable (the express conditions in the Memorandum here—including the requirements of feasibility and practicability—are far more robust than the three-word condition there), and in all events, *San Francisco* cannot be reconciled with *Allbaugh* and was wrongly decided. As Judge Fernandez persuasively explained in his *San Francisco* dissent, "[t]o brush those words ['consistent with law'] aside as implausible, or boilerplate, or even as words that would render the Executive Order meaningless was just to say that the plain language of the Executive Order should be ignored in favor of comments made dehors the order itself, none of which have resulted in the taking of any illegal action pursuant to the order." 897 F.3d at 1249. "That is not the proper way to deal with plain language—it is, instead, an attempt to rewrite the Executive Order itself and then to enjoin use of the newly written version." *Id.* (Fernandez, J., dissenting).[5]

Plaintiffs also note that courts have not applied the facial-challenge framework in other apportionment challenges. *See* Pl. Opp. at 16. But that is because the vast majority of census cases—unlike this one—concern *post*-apportionment challenges. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452 (2002); *Franklin v. Massachusetts*, 505 U.S. 788 (1992).[6] And the only census cases decided by the Supreme Court *pre*-apportionment have involved challenges to the mechanics of conducting the census as a

---

[5] In a further effort to sidestep the plain language of the Memorandum, Plaintiffs also point to Presidential statements and certain brief remarks the Attorney General made in congressional testimony that did not concern feasibility. Pl. Opp. at 4-6; Doc. 73–1. But the Memorandum does not delegate any decisional authority to the Attorney General, and in all events, Executive Branch communications that express federal policy but lack the force of law "are merely precatory." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329–30 (1994).

[6] The fact that post-apportionment challenges are not only possible but have actually, and repeatedly, been raised belies Plaintiffs' protests about "bizarre Catch-22[s]" and "Kafkaesque" proceedings. Pl. Opp. at 1-2.

whole where the challenged action was sufficiently concrete. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (challenge to a citizenship question on the 2020 Census); *Dep't of Commerce v. House of Representatives*, 525 U.S. 316 (1999) (challenge to the use of statistical sampling in census procedures).

Simply put, all of Plaintiffs' arguments—and their repeated, incorrect insistence that they "challenge Defendants' actual stated plans" *e.g.*, Pl. Opp. at 16—rely on a misreading of the Memorandum and on a determination by the Secretary that has not yet happened. *See City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). By rushing to the courthouse before the Secretary has determined what will in fact be feasible, Plaintiffs must, to succeed, demonstrate that *every* possible application of the Memorandum would be unlawful. That is the definition of a facial challenge. *See id.*; *see also* Pl. Opp. at 16 (admitting that facial challenge is one that "requests that the court go beyond the facts before it"). And to prevail on a facial challenge, "Plaintiffs must establish that there is *no* category of illegal aliens that may be lawfully excluded from the apportionment. This they cannot do." Def. Mem. at 38.

II. PLAINTIFFS HAVE NOT SATISFIED ARTICLE III'S REQUIREMENTS

As Plaintiffs rest their arguments on a memorandum of their own making, their opposition brief is largely non-responsive to Defendants' motion and the Memorandum as written. That simply confirms that their claims do not satisfy the requirements of Article III.

A. Plaintiffs' Claims Are Not Ripe

Plaintiffs admittedly "focus[] on just one type of injury": their supposed apportionment injuries. *See* Pl. Opp. at 2. Those supposed injuries are simply not ripe.

"[B]ecause it is not known what the Secretary may ultimately transmit to the President," Defendants have explained, "it is necessarily not yet known whether the President will be able to exclude some or all illegal aliens from the apportionment base." Def. Mem. at 8. And for this reason, the various opinions of Plaintiffs' expert regarding the possibility that one of the Individual Plaintiffs,

or a member of one of the Organization Plaintiffs, may sustain a representational injury, *see, e.g.*, Pl. Opp. at 3, 9-10, are entirely speculative because they assume speculative predictions of future, hypothetical action. *Cf.* Def. Mem. at 12 ("Plaintiffs argue that at least one Individual Plaintiff or unnamed Common Cause member will be 'expected to lose a House seat if the Memorandum is implemented.' But the expert report undergirding that analysis is premised on the speculative notion that *all* illegal aliens will be excluded from the apportionment base."); Pl. Opp. at 9 ("Defendants might choose to exclude only the 3.2 million persons on the non-detained docket of Immigrations and Customers [sic] Enforcement . . . ."); *id.* at 9–10 (discussing the possibility that "the Census Bureau will at least exclude the undocumented immigrants living in California").

With respect to supposed future apportionment injuries, the *New York* panel got it right. "[A]s of today," that court explained, "it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is 'feasible' to do so at all." *New York*, slip op. at 36. And "[i]n the absence of that information," the *New York* plaintiffs' "first theory of harm is likely 'too speculative for Article III purposes.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Indeed. As Defendants previously explained, "Plaintiffs' apportionment claims are unripe as they 'rest upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Def. Mem. at 8 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). As a result, any decision opining on the lawfulness of the Secretary's as-yet unfinished report to the President under the Memorandum necessarily would be an improper advisory opinion.

Plaintiffs' other arguments fare no better. Plaintiffs do not dispute that "census and apportionment cases generally are decided post-apportionment." Def. Mem. at 9; *cf.* Pl. Opp. at 15. Although Plaintiffs raise the specter that "a post-certification apportionment do-over" would "risk plunging the nation into . . . crisis," Pl. Opp. at 15; *see also id.* at 14, the Supreme Court has disagreed.

See Evans, 536 U.S. at 463 ("Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post–2000 census congressional election.").[7] And Plaintiffs' citation of *House of Representatives* for the proposition that "the harms of refusing to proceed [now] are real and dire," Pl. Opp. at 14, is inapt because the statistical sampling at issue in *House of Representatives* was part-and-parcel of the enumeration *procedures*, *see* 525 U.S. at 324-26—a multibillion-dollar operation that can involve hundreds of thousands of enumerators, which, unlike apportionment, as a practical matter cannot easily be redone.

Plaintiffs also argue that the question "whether the Constitution and statutes permit the President to exclude undocumented immigrants from apportionment" is purely legal. Pl. Opp. at 14. But that could be true only for a facial challenge. Otherwise, the legal analysis may differ based on what subsets of illegal aliens are, in fact, excluded because the Secretary has deemed it feasible, and the President has determined that it is practicable and within his discretion. Waiting until after the Census Bureau completes its ongoing process and determines how it may implement the Memorandum would patently "advance" the Court's "ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

Citing the *House of Representatives* litigation, Plaintiffs argue that "both this Court and the Supreme Court have rejected the Government's argument that an apportionment challenge is not ripe

[7] In a notice filed earlier today, Plaintiffs argue that Defendants' filing of a motion to expedite in their Supreme Court challenge to the *New York* decision "contradicts the Government's ripeness arguments here." Pl. Not., Doc. 73, at 1–2. In fact, Defendants' motion to expedite expressly states that "a post-apportionment remedy" is "available," Doc. 73–3 at 6, but expedited consideration is nevertheless warranted because, absent expedited relief, "the Secretary and the President will be forced to make reports by the statutory deadlines that do not reflect the President's important policy decision concerning the apportionment." *Id.* at 2.

in this posture," and that "[t]he same must be true here." Pl. Opp. at 13. Not so. "Critical to" the district court's ripeness determination was the fact that "the informational and compositional injuries" in that case "originate from the *procedure* utilized for conducting the 2000 census." *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998) (emphasis in original), *appeal dismissed*, 525 U.S. 316 (1999); *cf.* Pub. L. No. 105–119, § 209(b), (c)(2) (defining the Census 2000 Operational Plan to be final agency action for purposes of pre-apportionment challenges to sampling procedures); *Franklin*, 505 U.S. at 798–99 (explaining that the Secretary's report to the President is not final agency action for challenges to the apportionment base). This case is completely different because Plaintiffs here "are *not* challenging the enumeration procedures themselves." Def. Mem. at 10 (emphasis added). In fact, *House of Representatives* only further demonstrates that this action is not ripe. The district court in that case explained that "[t]he matter . . . becomes ripe at . . . the point at which it is *certain* that the Bureau will employ statistical sampling in conducting the apportionment enumeration." 11 F. Supp. 2d at 91 (emphasis added). In that case, "[t]hat time [was] now." *Id.* Here, in contrast, that time is *not* now, because it is far from "certain" what methodology or methodologies the Census Bureau might employ to implement the Memorandum. *See* Abowd Sept. Decl., Doc. 60–1, ¶ 11.[8] To the extent that Plaintiffs have a point, it is that *some* pre-apportionment challenges may be ripe. But they have not demonstrated—and cannot demonstrate—that *this* challenge is ripe.

The procedure/apportionment distinction also demonstrates why Plaintiffs' statistical-sampling claim is not ripe for review. Any implementation of the Memorandum "will not involve the

[8] In fact, the only thing "certain" at this point is "that any methodology or methodologies ultimately used by the Census Bureau to implement the [Memorandum] will not involve the use of statistical sampling for apportionment purposes." Abowd Sept. Decl., Doc. 60–1, ¶ 14. Plaintiffs' insinuation that the Census Bureau's Chief Scientist, a respected scholar, a dedicated Bureau employee, and a member of the career Senior Executive Service, *see id.* ¶ 3, is misleading the Court—based solely on their expert's hypothesizing about a non-finalized Bureau process and the Defendants' refusal to divulge details about its ongoing deliberative process, *see* Pl. Opp. at 33–35—is entirely baseless.

use of statistical sampling for apportionment purposes." Abowd Sept. Decl., Doc. 60-1, ¶ 14. Plaintiffs' haphazard speculation about what Defendants *might* do in the *future*, *cf.* Pl. Opp. at 33–35, only proves this point. Moreover, Defendants explained in their opening memorandum that the concern expressed in the 1998 Appropriations Act—"the risk of an inaccurate, invalid, and unconstitutional census," 1998 Appropriations Act § 209(a)(7)—does not exist here in part because "the Memorandum instructs the Secretary to provide the tabulation that follows the methodology set forth in the Residence Criteria." Def. Mem. at 10. Plaintiffs offer no response to that point.

Finally, Plaintiffs argue that Defendants' motion for a stay of judgment pending appeal in the *New York* litigation somehow "undermines the Government's justiciability arguments in this case." Pl. Notice, Doc. 68 at 1. It does not. As Defendants have made clear in that litigation, the *New York* judgment will impose an irreparable harm if it prevents the Secretary from sending a report to the President in accordance with the policy judgment set forth in the Memorandum. That does not mean that the plaintiffs' challenge there was presently justiciable—and, indeed, Defendants have consistently argued that it is not. *See* Doc. 68–1, at 2–4.

B. Plaintiffs Do Not Have Standing

As Plaintiffs explained in their opening memorandum, "this case involves a number of different plaintiffs and several distinct theories of harm." Doc. 31–1 ("Pl. Mem.") at 9. Plaintiffs now profess confusion as to why Defendants "devote[] much of [their] standing discussion to theories of injury . . . and categories of plaintiffs . . . as to which Plaintiffs have not moved." Pl. Opp. at 2. To dispel any possible confusion, Defendants' opposition brief doubles as its cross-motion to dismiss, and Defendants have moved to dismiss this action on the grounds that, *inter alia*, no plaintiff has standing under any theory of injury. *See generally* Def. Mem. at 11–21.

1. *Plaintiffs' Alleged Apportionment Injuries Are Too Speculative to Confer Standing*

The *New York* panel expressed its "considerable doubt" that the plaintiffs in that case could demonstrate standing based on supposed apportionment injuries because "it is not known whether that harm will come to pass, as the Secretary has not yet determined how he will calculate the number of illegal aliens in each State or even whether it is 'feasible' to do so at all." *New York*, slip op. at 36.

So, too, here. Plaintiffs represent that there is "no genuine dispute that . . . implementation of the Memorandum will cause multiple voter-plaintiffs and Common Cause members to suffer" a loss of representation sufficient to give rise to an injury-in-fact. Pl. Opp. at 3. But this representation is demonstrably incorrect. Plaintiffs' supposed future apportionment harms are premised on the speculative belief that "implement[ing]" the Memorandum "as written" requires excluding all illegal aliens from the apportionment base regardless of feasibility, practicability, and legality. *See, e.g.*, Pl. Opp. at 3–7. As explained above, *see supra* Part I, this premise is false and their allegations contradict the Memorandum's plain language.

Plaintiffs also do not dispute that their apportionment expert's analysis "is premised on the . . . notion that *all* illegal aliens will be excluded from the apportionment base," Def. Mem. at 12—a presumption that, again, at this point in time, is pure conjecture. In Plaintiffs' opposition, their expert opines on apportionment harms based on equally speculative factual premises. *See id.* at 9–10. But Plaintiffs have not plausibly alleged a substantial risk of future harm because—again—the Census Bureau has not yet conclusively decided what methodology or methodologies it might employ. *See* Abowd Sept. Decl., Doc. 60-1, ¶ 11. And Plaintiffs do not contest that "'for standing purposes, [courts] may reject as overly speculative those links which are predictions of future events.'" Def. Mem. at 11-12 (quoting *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)).

Rather than acknowledge their deficiencies in pleading and proof, Plaintiffs try to turn the tables and complain that the government has not waived its deliberative-process privilege and divulged

details about its non-final methodologies. *See* Pl. Opp. at 6–7. But—as in *Franklin*, *Evans*, *Wisconsin*, and other cases challenging policy decisions about apportionment—Plaintiffs could have waited to file suit until after the Secretary had reached a final determination about how to implement the Memorandum, and then challenge that known determination. In all events, *Plaintiffs* bear the burden of demonstrating standing, *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 239 (D.C. Cir. 2015), and because they are "seek[ing] injunctive relief," they face "a significantly more rigorous burden to establish standing than . . . parties seeking redress for past injuries," *id.* at 240.

In sum, given that the Memorandum expressly directs the Secretary to exclude illegal aliens from his report only "to the maximum extent feasible and consistent with the discretion delegated to the executive branch," 85 Fed. Reg. at 44,680, any apportionment-based injury is wholly "speculative" at this time, *Clapper*, 568 U.S. at 401, because it depends entirely on uncertain facts about precisely how many illegally aliens will actually be excluded and where they are relatively located.

2. *Plaintiffs' Allegations That the Presidential Memorandum Will Reduce Participation in the 2020 Census Fail To Establish Standing*

Plaintiffs allege injury based on a supposed census undercount, Am. Compl. ¶¶ 152–159, and supposed loss of government funds based on an undercount, *id.* ¶¶ 160–167. Defendants explained in their opening brief that these supposed enumeration injuries "are too speculative to confer standing." Def. Mem. at 13–15 (initial capitalization omitted). Plaintiffs make no effort to grapple with Defendants' analysis; instead, they simply contend that "[t]hese precise arguments were considered and rejected by the *New York* panel," citing 22 pages from that court's slip opinion. Pl. Opp. at 42 (citing *New York*, slip op. at 37–58).

As a threshold matter, Plaintiffs have forfeited this point. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007). In all events, Plaintiffs are wrong: the *New York* opinion does not help Plaintiffs here, for at least three reasons. *First*, the *New York* panel

expressly did *not* analyze whether the plaintiffs in that case had standing based on a supposed loss of federal funds, deciding instead to focus on "two other forms of injury [that] are more certain on the current record." *New York*, slip op. at 41. *Second*, although the *New York* panel determined that there was standing based on supposed degradation of census data, the court's analysis was largely based on injuries that would be inflicted "on the sovereign interest of reliant States" by that supposed degradation. *New York*, slip op. at 43; *see generally id.* at 42–45 (focusing on States' "sovereign interests"). Plaintiffs here, however, include no States, and they do not dispute that the City Plaintiffs' power "is derivative and *not* sovereign." Def. Mem. at 21 (emphasis added). *Finally*, even assuming that the City Plaintiffs have "sovereign interests" like States, the City Plaintiffs have not alleged that they "have enacted their reliance on federal census data into law" as the governmental plaintiffs demonstrated in *New York*. *New York*, slip op. at 46; *cf.* Am. Comp. ¶¶ 152-159 (leveling no such allegations).

As to traceability, Plaintiffs' theory—taken to its logical conclusion—is that traceability can be satisfied solely on the basis of misinformation generated by third parties. That cannot be the case. Plaintiffs and the *New York* panel rely on *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), but the citizenship-question litigation is distinguishable. In that litigation, the plaintiffs "met their burden of showing that third parties will likely react in predictable ways to the citizenship question" and the Supreme Court thus upheld standing based "on the predictable effect of *Government action* on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. at 2566 (emphasis added). Here, however, Plaintiffs fail to dispute that "the Presidential Memorandum is not directed to census respondents and does not relate to the actual conduct of the census." Def. Mem. at 15. Accordingly, unlike in the citizenship-question litigation, Plaintiffs' traceability argument is based on the effect of *third-party* action on the decisions of *other third parties*. *See* Am. Compl. ¶ 154 n.27.

As to redressability, Plaintiffs argue that their "burden is merely to allege with plausibility that the risk of harm would be reduced to some extent if they receive the relief they seek." Pl. Opp. at 43.

But Plaintiffs have not met this burden. Insofar as anyone has been chilled from participating in the census by the Memorandum—notwithstanding that the Memorandum in no way penalizes participation—it is implausible that relief from this Court would be likely to eliminate that chill. The President has made clear that he "intends to vindicate [his] policy determination before the Supreme Court" on appeal and then "implement [that] policy decision." The White House, Statement from the Press Secretary (Sept. 18, 2020), Doc. 73–1. Plaintiffs have not alleged—let alone plausibly alleged—that a material number of otherwise-chilled persons are likely to become un-chilled by a district court decision subject to a realistic prospect of appellate reversal. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992) ("Standing is not an ingenious academic exercise in the conceivable."). Moreover, any chilling effect will no longer exist once census field operations have ended; yet the Secretary's report containing the requested information will not be completed until December 31, 2020, long after that time. Accordingly, by the time any relief this Court could issue against that report would have coercive legal effect, the injury it is supposed to redress will no longer exist. That is the very definition of non-redressability.

3. Plaintiffs Lack Standing Based on Supposed Dignitary Harm

Plaintiffs' opposition proves that they lack standing based on supposed dignitary harm. Putting aside Plaintiffs' pleading deficiencies on this point, *see* Def. Mem. at 17, which they do not even address, Plaintiffs do not dispute that to establish standing, "'the alleged injury must affect the plaintiff in a personal and individual way,'" and "'there must be some connection between the plaintiff and the defendant that 'differentiates' the plaintiff so that his injury is not 'common to all members of the public.'" Def. Mem. at 18 (quoting *Defs. of Wildlife*, 504 U.S. at 560 n.1, and *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019)). Far from explaining how they have been affected in "a personal and individual way," Plaintiffs instead argue that the Memorandum has

"target[ed]" entire "racial and ethnic communities," Pl. Opp. at 43, thus making plain that any supposed dignitary harm is completely undifferentiated.

4. The Organization Plaintiffs Fail To Establish Standing

The Organization Plaintiffs cannot establish associational standing because they have not plausibly alleged that any of their members would have standing. *See generally supra* Part II.B.1-3.

Plaintiffs barely defend the Organization Plaintiffs' supposed organizational standing. They argue that "each of the organizational plaintiffs has alleged that an accurate census count of immigrant communities is crucial to its organizational mission and that the Memorandum is presently harming that key organizational interest." Pl. Opp. at 44. But such allegations, on their own, cannot support organizational standing. After all, Plaintiffs do not dispute that "'conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing.'" Def. Mem. at 19 (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996)).

Plaintiffs make no effort to explain how their allegations satisfy either prong of the organizational-injury analysis. *See generally* Def. Mem. at 19-20 (laying out the D.C. Circuit standard). Even assuming that Plaintiffs could plead organizational standing based solely on the notion that the Organization Plaintiffs have diverted resources (and they cannot), Plaintiffs' allegations on this point are "conclusory and insufficient to state a plausible claim." *Robinson v. Wutoh*, 788 F. App'x 738, 739 (D.C. Cir. 2019) (per curiam); *see* Pl. Opp. at 45 (quoting conclusory allegations at Am. Compl. ¶¶ 171, 174). Plaintiffs direct the Court to the *New York* panel's organizational-standing analysis, but the detailed facts proffered by the *New York* plaintiffs, *see New York*, slip op. at 48-49 (citing several detailed examples reflecting diversion of resources), only show how threadbare Plaintiffs' allegations are.

5. The City Plaintiffs Lack Standing

In their Amended Complaint, Plaintiffs leveled allegations about harms supposedly suffered by many of the Individual Plaintiffs, many members of the Organization Plaintiffs, and "many

residents of the city Plaintiffs." Am. Compl. ¶¶ 147, 151, 165. Plaintiffs now represent that the City Plaintiffs "do not seek to represent those residents on a *parens patriae* theory." Pl. Opp. at 45. Having abandoned their *parens patriae* theory, the City Plaintiffs, we are told, "sue on their own behalves" based on a supposed loss of "funding and resources." *Id.* But, as explained above and in Defendants' opening brief, Plaintiffs have not adequately alleged standing based on a supposed loss of government funds. *See, e.g.*, *supra* Part II.B.2. Accordingly, the City Plaintiffs all lack standing.

III. PLAINTIFFS FAIL TO STATE A CLAIM

A. Plaintiffs Have Failed To State an Apportionment Clause Claim (Count I)

In their opening memorandum, Defendants spent over sixteen pages explaining that Plaintiffs have failed to state an Apportionment Clause claim. Def. Mem. at 22–38. Plaintiffs' opposition, Pl. Opp. at 17–26, largely fails to address—let alone rebut—Defendants' analysis. Instead, Plaintiffs first mischaracterize Defendants' position as being that illegal aliens are not "persons." Pl. Opp. at 20. But that is emphatically *not* Defendants' position. In fact, Defendants made clear in their opening brief "that illegal aliens *are* 'persons.'" Def. Mem. at 44 (emphasis added) (citing *Plyler v. Doe*, 457 U.S. 202 (1982)). Rather, Defendants explained in painstaking detail that "the Apportionment Clause has been understood to require counting 'inhabitants,'" "[a]nd because the word 'inhabitants' is sufficiently indeterminate, the Supreme Court has recognized that the term confers significant discretion on the Executive to make legal determinations about who qualifies as an 'inhabitant' without treating his physical presence in a particular jurisdiction (or lack thereof) as dispositive." Def. Mem. at 23 (citing *Franklin*, 505 U.S. at 804–06); *see generally id.* at 22–38. Plaintiffs do not meaningfully address the core argument that Defendants actually made, and they tellingly make no effort to distinguish *Franklin*, the Supreme Court case that is most directly on point.

Rather than address Defendants' core argument, Plaintiffs seize on a single sentence in Defendants' brief about how there were no federal laws restricting immigration until 1875, Def. Mem.

at 33, and incorrectly deem *that* argument as being "[t]he Government's central argument." Pl. Opp. at 21. But even Plaintiffs' arguments relating to federal immigration laws (or the lack thereof) miss the mark. *First*, Plaintiffs argue that "we are governed by the enacted text—not by 'the limits of the drafters' imagination.'" Pl. Opp. at 21 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020)). But Plaintiffs miss the point: the question is not whether the Framers could have "imagined" an illegal alien; the question is whether the term "inhabitants" *must*, as a constitutional matter, include *all* illegal aliens. And the answer is no: as Defendants explained in their opening brief, "historical evidence confirms that the term 'inhabitant' was understood to require, at a minimum, a fixed residence within a jurisdiction and intent to remain there," Def. Mem. at 29; *see generally id.* at 26–27 & n.3, and, further, "Founding-era sources"—which Plaintiffs do not address—"also reflect that, especially with respect to aliens, the term could be understood to further require a sovereign's permission to enter and remain within a given jurisdiction." *Id.* at 29 (citing *The Venus*, 12 U.S. (8 Cranch.) 253, 289 (1814) (Marshall, C.J., concurring in part and dissenting in part); *The Federalist* No. 42, at 285 (Madison)).

Plaintiffs knock this definition of "inhabitant" as "idiosyncratic" and "irrelevant," Pl. Opp. at 24–26, but that definition was given by Emmerich de Vattel, "whom the Supreme Court has extolled as the 'founding era's foremost expert on the law of nations,'" and was (unsurprisingly) familiar to prominent figures like James Madison and Chief Justice Marshall. Def. Mem. at 34 (quoting *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019)); *see id.* at 29. In all events, Plaintiffs miss the point. "The point is that the term 'inhabitants'—and the concept of 'usual residence'—are sufficiently indeterminate to give the President significant discretion within constitutional bounds." Def. Mem. at 29. And Vattel demonstrates that "the Founding generation was aware that the term 'inhabitant' *could* be understood to require that an alien be given permission to settle and stay in a jurisdiction." *Id.* at 34 (emphasis added). Contrary to Plaintiffs' suggestion, *see* Pl. Opp. at 25, it makes eminent sense to consider an alien-specific definition of "inhabitant" in ascertaining how that indeterminate word

applies to particular categories of persons with debatable ties to a State, especially when the draft Constitution itself drew a distinction between "citizens and inhabitants" for apportionment purposes. 2 *The Records of the Federal Convention of 1787*, at 571 (Max Farrand ed., 1911) (Federal Convention); *see id.* at 561. That is no different than the Supreme Court's choice in *Franklin* to consult historical understandings of whether an American diplomat stationed abroad remained an "inhabitant" of his home state in determining whether the Executive Branch could conclude the same with respect to overseas military personnel. *See* 500 U.S. at 805. Plaintiffs do not address these actual arguments, choosing instead to mischaracterize Defendants' actual position. *Cf.* Pl. Opp. at 25 (mischaracterizing Defendants' position as that "inhabitants" "*must* be limited to those who are present in a jurisdiction with its government's 'permission'" (emphasis added)).

Plaintiffs also argue that "the word the Constitution actually uses is 'persons,' not 'inhabitants'" and "the word 'persons' is not ambiguous in the least." *Id.* (citation and internal quotation marks omitted). But Defendants are not equating the term "inhabitants" with the term "persons." Rather, as Defendants made clear in their opening brief, the term "inhabitants" is equivalent to the phrase "persons *in each State*," Def. Mem. at 25 (emphasis added)—a point Plaintiffs seem to grasp just two paragraphs later in their brief. *See* Pl. Opp. at 25–26. And taking Plaintiffs' argument to its logical conclusion, the census should be required to count foreign tourists and diplomats, as they are surely "persons." *See also id.* at 25 ("If [the Framers] had actually intended to exclude such people from the apportionment base, they would have said so explicitly—just as they made explicit exclusions for enslaved people and 'Indians not taxed.'"). But not even Plaintiffs advance that argument. *See* Pl. Opp. at 17–18 (indicating that "tourists and business travelers" would not "qualify for inclusion in apportionment"); *cf.* Def. Mem. at 27. Defendants' point is that the Apportionment Clause has never been construed to require in the apportionment base all persons physically present within a State's boundaries. Rather, as Defendants have explained, it is linked to the term "inhabitants" and the

concept of "usual residency," *see* Def. Mem. at 23–27, which are "sufficiently ambiguous to give Congress, and by delegation the Executive, significant discretion to define the contours of 'inhabitants' for apportionment purposes." *Id.* at 27–28.

Plaintiffs' other history-based arguments, Pl. Opp. at 20–24, are similarly irrelevant. Even crediting their account of history for the sake of argument, these contentions at most stand for the proposition that illegal aliens *may* be included in the apportionment base, not that *all* of them *must* be. After all, *Franklin*—which Plaintiffs conspicuously decline to address in the context of this argument—upheld the Executive's decision to scuttle a nearly unbroken 180-year-old practice of not allocating federal personnel stationed overseas to the apportionment base of their home States as "consonant with, though not dictated by, the text and history of the Constitution." 505 U.S. at 806; *see id.* at 792-93. There is no reason why the previous inclusion of illegal aliens in the apportionment base—Esther Kaplan among them, *see* Pl. Opp. at 19—should be treated as more authoritative than the previous exclusion of overseas personnel abandoned in *Franklin*.

Finally, Plaintiffs argue "that undocumented immigrants whose usual residence is in the United States cannot be lawfully excluded solely because of their immigration status." Pl. Opp. at 17. But Plaintiffs do not acknowledge that this entire dispute revolves around *which* illegal aliens have their "usual residence" in the United States. *See generally* Def. Mem. at 23–27 (section entitled "Only 'Inhabitants' Who Have Their 'Usual Residence' in a State Need Be Included in the Apportionment."). When it suits them, Plaintiffs rely on the Residence Criteria (which they call the Residence Rule) to divine the meaning of "usual residence." Pl. Opp. at 18. And in doing so, they disprove their claim in at least two ways. *First*, as Defendants have explained, and Plaintiffs have not disputed, Plaintiffs' reliance on the Residence Criteria "impliedly suggest[s] that not even they dispute that the Executive has discretion to define 'inhabitant' and to determine who meets its strictures." Def. Mem. at 30. "The Presidential Memorandum is no different insofar as it reflects the Executive Branch's

discretionary decision to direct the Secretary in making policy judgments that result in the decennial census." *Id.* *Second*, the Census Bureau's Residence Criteria does not bind even the Secretary of Commerce, much less the President. *Franklin*, 505 U.S. at 799; *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996). "There is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level." *Cmty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003).

B. Plaintiffs Have Failed To State an Equal Protection Claim for Vote Dilution and Representational Injury (Count II)

Plaintiffs do not dispute that the Supreme Court twice declined—in *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992), and *Wisconsin v. City of New York*, 517 U.S. 1 (1996)—"to extend the *Wesberry-Reynolds* equal protection intrastate apportionment standard to interstate apportionment determinations." Def. Mem. at 39–40. And Plaintiffs make no effort to address these cases head-on. Instead, they simply argue that "well after" these decisions, the Supreme Court supposedly "held in *House of Representatives* that where voters challenge an interstate apportionment determination, the loss of a Representative constitutes unconstitutional vote dilution." Pl. Opp. at 39 (citing *House of Representatives*, 525 U.S. at 332). Plaintiffs' proposition is not remotely accurate.

House of Representatives did not hold that the loss of a Representative constitutes "unconstitutional vote dilution." *House of Representatives* is not an equal protection case. Its majority opinion cites neither *Wisconsin* nor *Montana*. In fact, *House of Representatives* did not even decide the constitutionality of any governmental action at all. *See* 525 U.S. at 343 (deciding the case on statutory grounds and stating, "we find it unnecessary to reach the constitutional question presented"). Instead, as Plaintiffs appear to recognize, *see* Pl. Mem. at 10, *House of Representatives* simply held that the impending loss of a Representative because of a challenged apportionment is an injury-in-fact for Article III purposes. *See* 525 U.S. at 331–32. That certain losses of representation may constitute

injuries-in-fact for standing purposes is a far cry from a holding that "the loss of a Representative constitutes unconstitutional vote dilution" for a substantive equal-protection claim. Pl. Opp. at 39.

Plaintiffs' alternative argument—that *Montana* and *Wisconsin* "sanctioned deviations from equal population for specific reasons grounded in the Constitution," Pl. Opp. at 39—is similarly misguided. As Defendants have shown, the Constitution vests Congress, and by delegation, the Executive, with significant discretion to define the apportionment base. *See* Def. Mem. at 27–28. By Plaintiffs' own reasoning, *Montana* and *Wisconsin* bar Plaintiffs' equal-protection challenge for this additional reason.

Finally, while Plaintiffs are correct to note that a plaintiff need not demonstrate "probability" at the pleading stage, a plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs' attenuated chain of speculation as to what decisions the Census Bureau and the President may make at some future point in time, as well Plaintiffs' predictions as to how those decisions may impact apportionment, fall woefully short of satisfying that standard. *See* Def. Mem. at 38–39.

C. Plaintiffs Have Failed To State an Equal Protection Claim for Invidious Discrimination (Count III)

Plaintiffs do not dispute that "the Memorandum is facially neutral with respect to race, ethnicity, and national origin," or that illegal aliens and non-citizens "do not constitute . . . protected class[es]." Def. Mem. at 41. Plaintiffs nevertheless argue that they have adequately pleaded a "starkly disparate impact on Latino populations," Pl. Opp. at 40, but such allegations are irrelevant as Plaintiffs cannot infer animus from an alleged disparate impact in this context. Indeed, Plaintiffs acknowledge that *DHS v. Regents of University of California,* 140 S. Ct. 1891 (2020), stands for the proposition that, in a similar context, "disparate impact alone was insufficient to state a claim." Pl. Opp. at 40.[9]

[9] Defendants acknowledge that its citations to *Regents* in its opening brief are to Chief Justice Roberts's four-Justice plurality opinion as to the plaintiffs' equal-protection claim in that case. Four other Justices concurred in the judgment rejecting the plaintiffs' equal-protection claim. *See* 140 S. Ct.

Instead, Plaintiffs suggest that the President acted with hidden animus because "the Memorandum breaks from hundreds of years of 'historical background' *without explanation*." Pl. Opp. at 40 (emphasis added). But this proposition is belied by the Memorandum itself, which includes a non-discriminatory explanation justifying the President's decision. *See, e.g.*, Def. Mem. at 43. Nor have Plaintiffs leveled allegations about a supposedly "unusual 'procedural sequence,'" *see* Pl. Opp. at 40, that could plausibly support discrimination against members of an *actual protected class*. And while Plaintiffs may deem the President's decision to exercise his discretion as "unprecedented in the history of our nation," Pl. Opp. at 41, the Supreme Court has made clear that it is not. After all, as noted above, *see supra* Part III.A, *Franklin* upheld the Executive's decision to abandon a nearly unbroken 180-year-old practice of not allocating federal personnel stationed overseas to the apportionment base of their home States. 505 U.S. at 806; *see id.* at 792-93. There is no reason why the previous inclusion of illegal aliens in the apportionment base should be treated as more sacrosanct.

Plaintiffs urge that they can satisfy their burden by pointing to statements made by Thomas Hofeller, but, again, *see* Def. Mem. at 42–43, statements made by non-decisionmakers "remote in time and made in unrelated contexts" are "unilluminating." *Regents*, 140 S. Ct. at 1916 (plurality opinion). Finally, they claim that they have alleged "contemporary statements" from "the President himself" that supposedly "reflect the intent to disparage and harm immigrant and Latino communities." Pl. Opp. at 40 (citing Am. Compl. ¶¶ 95–96, 100–114, 192). But the actual *presidential* statements in those allegations concern only illegal aliens or non-citizens, which groups, again, do not constitute protected classes. *See* Am. Compl. ¶¶ 95, 109–111, 113.

---

at 1919 n.1 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1936 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

D. Plaintiffs Have Failed To State an *Ultra Vires* Claim (Count IV)

Plaintiffs identify no private statutory right of action that allows them to enforce either 13 U.S.C. § 141 or 2 U.S.C. § 2a. Accordingly, those statutes impliedly preclude private review. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate.") While the *ultra vires* doctrine allows for "nonstatutory review" of "extremely limited scope," *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 76 (D.D.C. 2016), that review is subject to the "Hail Mary pass" standard that Defendants established in their opening brief, Def. Mem. at 43, because that standard applies where, as here, "the statutory preclusion of review is implied rather than express." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). That said, Plaintiffs' *ultra vires* claim fails under any standard.

Plaintiffs argue that 2 U.S.C. § 2a "demands the inclusion of 'illegal' immigrants in the apportionment base." Pl. Opp. at 29. But that is not true. Every census since the Census Act has excluded from the apportionment base individuals without a usual residence, whether those individuals are citizens, legal aliens, or illegal aliens. Indeed, Plaintiffs appear to concede that foreign "tourists and business travelers" may be excluded from the apportionment base, *see* Pl. Opp. at 18; *cf.* Def. Mem. at 27, yet Congress has never passed a statute expressly specifying that foreign tourists and business travelers are excluded from apportionment. So Plaintiffs are wrong to deny "that the 1929 Act somehow delegated to the President the discretion to exclude undocumented immigrants from apportionment," Pl. Opp. at 28, because the President has admittedly been delegated the discretion to exclude individuals for lack of "usual residence." *See Franklin*, 505 U.S. at 799 ("§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census.'").

Plaintiffs also argue that § 2a should be interpreted differently from the Constitution's Apportionment Clauses. Pl. Opp. at 27–29. Plaintiffs are wrong. Section 2a(a)'s directive that the

President's report include "the whole number of persons in each State" (excluding untaxed Indians), 2 U.S.C. § 2a(a), repeats verbatim the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 2, which in turn modified Article I's Apportionment Clause to end the infamous three-fifths compromise, *see* U.S. Const. art. I, § 2, Cl. 3. And "if a word is obviously transplanted from another legal source," it generally "brings the old soil with it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018).

Despite this "settled" canon, *see In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 117 (D.C. Cir. 2020) (Katsas, J., concurring), Plaintiffs instead point the Court to § 2a's legislative history to divine "the enacting Congress's understanding and intent." Pl. Opp. at 28–29. But at most, they just note that the 1929 Congress (like the Framers of the Fourteenth Amendment) had rejected amendments to exclude *all* aliens from the apportionment base, and that the Senate's legislative counsel opined that such an exclusion would violate the Fourteenth Amendment. *Id.*[10] That legislative history, however, does not answer whether the 1929 Congress prohibited the President from excluding *illegal* aliens from the apportionment base. Although aliens who are "permitted to settle and stay in the country," 1 Emmerich de Vattel, *The Law of Nations*, Ch. 19, § 213 (1760), may well qualify as "inhabitants," that in no way resolves the question here: whether aliens who are *not* permitted to settle, and remain subject to *removal* by the government, nevertheless are "inhabitants" of, with an "enduring tie to" and a "'usual residence'" in, the United States. *Franklin*, 505 U.S. at 804. If Congress in 1929 meant to mandate that congressional representation be allocated on the basis of aliens who remain in the country in ongoing defiance of federal law, it presumably would have given a clearer indication that it was taking such an important step rather than merely copying into the U.S. Code the constitutional text "persons in each State," which had never been understood to compel such a result.

[10] Plaintiffs also note a failed amendment that would have required "an enumeration of aliens lawfully in the United States and of aliens unlawfully in the United States." 71 Cong. Rec. 2078–83 (1929) (S.312). That failed amendment concerned only enumeration rather than apportionment, and Plaintiffs do not contend that such an enumeration would be unlawful.

Plaintiffs also contend that the Memorandum violates 13 U.S.C. § 141 and 2 U.S.C. § 2a because, in their view, the Memorandum "purport[s] to base the apportionment calculation on a set of numbers different from those 'ascertained under . . . [the] decennial census.'" Pl. Opp. at 29–32; *see also id.* at 31 (arguing that the Census Act does not "permit[] the President to base his apportionment calculation on something other than the result of the census count that the Census Bureau actually conducted"). But *Franklin* explicitly *rejected* the notion that the Secretary's own views as to the contents of his report must be deemed the one true "decennial census." *See* 505 U.S. at 797 ("Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the 'decennial census.'"). Rather, as Plaintiffs acknowledge, *see* Pl. Opp. at 31, *Franklin* confirmed that the President may instruct the Secretary to "reform the census," including by changing the data considered when enumerating individuals. 505 U.S. at 797–98. "[T]he 'decennial census'" thus "still presents a moving target, even after the Secretary reports to the President" and "[i]t is not until the President submits the information to Congress that the target stops moving." *Id.* Accordingly, Plaintiffs are wrong when they contend that the tabulation based on the Residence Criteria constitutes "the actual census count," Pl. Opp. at 31, because *Franklin* makes clear that the President has full authority to direct a different approach. *See Wisconsin*, 517 U.S. at 23 ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision.").

Indeed, the Supreme Court has *specifically approved* the use of purported "non-census data"—like administrative records and imputation—in apportionment without remotely hinting that either one was unlawful. *See Franklin*, 505 U.S. at 794–96, 803–06 (approving the Census Bureau's use of "home of record" information from Defense Department personnel files for apportionment); *Evans*, 536 U.S. at 457–59, 473–79 (approving the Census Bureau's use of "hot-deck imputation" for apportionment). Even the *New York* panel conceded at one point that overseas personnel in *Franklin*

were "counted using administrative records" and, as such, they "were counted as part of the census itself." *New York*, slip op. at 68–69 n.15.

In fact, pursuant to the Executive Branch's discretion, the decennial census has never tallied the total population for the apportionment based solely on questionnaire responses, and it has often taken into account information from administrative records to correct or supplement the field data collection process. For the first 170 years of American census taking, no census questionnaire for self-response existed because all enumeration was done in person. *See New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 520 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 139 S. Ct. 2551 (2019). And for the 2020 census, individuals are being enumerated through (i) census-questionnaire responses online, by mail, or by phone; (ii) in-person visits by enumerators; (iii) proxy responses given by individuals such as a neighbor or landlord; (iv) high-quality administrative records from other federal agencies; and (v) potentially, imputed data from the same area (used as a last resort to fill data gaps). *Id.* at 521.

Next, Plaintiffs also contend that the Memorandum's instruction to provide two tabulations is, in and of itself, *ultra vires*. *See* Pl. Opp. at 29; *accord id.* at 31. But this proposition is undercut by the fact that, again, "there is no statute that rules out an instruction by the President to the Secretary to reform the census, even after the data are submitted to him." *Franklin*, 505 U.S. at 798. In other words, there is nothing illegal about the Secretary transmitting two tabulations *seriatim*. The Memorandum simply streamlines that process by requesting two tabulations simultaneously. And Plaintiffs do not dispute that, owing to Article II's supervisory powers and the Opinions Clause, they "cannot preclude the President from obtaining information from the Secretary, nor the Secretary from providing it." Def. Mem. at 46.

Finally, Plaintiffs perplexingly attempt to craft an argument out of then-Deputy Solicitor General Roberts's statement at oral argument in *Franklin* that the President "'is supposed to base his

calculation on the figures submitted by the Secretary.'" Pl. Opp. at 31–32 (quoting transcript). But that is precisely what the Memorandum contemplates. The Memorandum does not suggest that the President will simply render an apportionment out of whole cloth (the sort of counterfactual presented to the Deputy Solicitor General at argument); rather, the Memorandum expressly contemplates that the Secretary will submit two figures to the President, and the President will "base his calculation on" one of those "figures submitted by the Secretary."

E. Plaintiffs Have Failed To State a Claim for Lack of "Actual Enumeration" or Unlawful Statistical Sampling (Count V)

Plaintiffs' opposition proves that its fifth count has not been plausibly pled. Because the Secretary has not yet determined how he will implement the Memorandum, and because Plaintiffs' complaint and briefing is premised on a misreading of the Memorandum, *see generally supra* Part I, Plaintiffs necessarily cannot plausibly plead, and have not plausibly pleaded, that a future, hypothetical implementation of the Memorandum—as actually written—"will violate the Enumeration Clause and sampling statute." Pl. Opp. at 33.

Plaintiffs latch onto the *New York* panel's belief that any count of illegal immigrants would "'necessarily be derived from something other than the census itself.'" Pl. Opp. at 33 (quoting *New York*, slip op. at 66). Defendants have debunked the *New York* panel's faulty conclusion in their recently filed Jurisdictional Statement. *See* Doc. 73–2, Jurisdictional Statement in *Trump v. State of New York*, No. 20–366 (S. Ct. Sept. 22, 2020), at 18–23. In short, as explained above, *see supra* Part III.D, Plaintiffs and the *New York* panel are wrong in believing that the Secretary's tabulation based on the Census Bureau's Residence Criteria constitutes the "the census." Rather, *Franklin* makes clear that the President has full authority to direct a different approach. *See* 505 U.S. at 797 ("Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the 'decennial census.'").

Plaintiffs are also wrong when they argue that "any exclusion of undocumented immigrants from the apportionment base—partial or total—would violate the 'actual Enumeration' requirement." Pl. Opp. at 33. As explained above, *see supra* Part III.D, the decennial census has never tallied the total population for the apportionment based solely on questionnaire responses, and the Supreme Court has even *approved* the use of purported "non-census data" like administrative records and imputation. Plaintiffs suggest that "the Framers" would not "have recognized" these methods "as 'actual Enumeration,'" Pl. Opp. at 33, but to the extent that is true, it is beside the point. Again, in conducting the actual enumeration, the President's discretion is "virtually unlimited." *Wisconsin*, 517 U.S. at 19. And the Supreme Court has expressly held that imputation—meaning the *adding* of persons to the census who were not counted during field operations—is lawful. *Evans*, 536 U.S. at 457–59, 473–79. That decision squarely forecloses Plaintiffs' claims here.

As for Plaintiffs' statistical-sampling claim, nothing has changed since Defendants' opening brief: "Because the Presidential Memorandum can be implemented . . . without resort to statistical sampling, Plaintiffs' speculative allegations—that 'on information and belief, any quantification method that Defendants might employ . . . would be based on unlawful statistical sampling' Am. Compl. ¶ 128 (emphases added)—'do not cross the line between possibility and plausibility.'" Def. Mem. at 48. And even if Plaintiffs could fill that void with their expert's opinions (and they cannot), their expert *admits* in her supplemental declaration that there do, in fact, exist some number of "administrative records that reliably document undocumented immigrants and their geographic location on April 1, 2020." Hillygus Suppl. Decl., Doc. 67–4, ¶ 14. At most, her opinions stand for the proposition that it would not be possible to "enumerate" *all* illegal aliens "without violating the prohibition on sampling." *Id.* And as Defendants have repeatedly made clear, that is not what the Memorandum directs. *See supra* Part I.

F. Plaintiffs' Demands for Relief Against the President Must Be Dismissed

Retreating from their previous skepticism, *see* Pl. Mem. at 15, Plaintiffs now insist that "relief against the president personally is proper." Pl. Opp. at 36. In so doing, Plaintiffs attempt to limit the unambiguous commands against enjoining the President in *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), to situations where the President acts "*within* the President's discretion." Pl. Opp. at 37. *Newdow* and *Mississippi*, however, contain no such limitation. Indeed, *Newdow*'s conclusion on this point is unequivocal: "With regard to the President, courts do not have jurisdiction to enjoin him, . . . and have never submitted the President to declaratory relief." 603 F.3d at 1013; *see also Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment").

Attempting to evade *Newdow* and *Mississippi*, Plaintiffs cite *Franklin* for the proposition that "the President *can* be 'subject to judicial injunction requiring the performance of a purely 'ministerial' duty." Pl. Opp. at 37 (quoting *Franklin*, 505 U.S. at 802–03) (emphasis added). Plaintiffs again mischaracterize Supreme Court precedent. *Franklin* actually states: "We have *left open* the question whether the President *might* be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty." 505 U.S. at 802 (emphasis added). "Several lower courts, however, have held or suggested that courts lack jurisdiction to order injunctive relief directly against the President even for so-called ministerial acts." *Citizens for Responsibility & Ethics in Wash. v. Trump*, 971 F.3d 102, 110 (2d Cir. 2020) (Menashi, J., dissenting from denial of rehearing en banc) (citing, *inter alia*, *Lovitky v. Trump*, No. 19–1454, 2019 WL 3068344, at *10 (D.D.C. July 12, 2019) (Kollar-Kotelly, J.), *aff'd in part, vacated in part on other grounds*, 949 F.3d 753 (D.C. Cir. 2020)).

And *Franklin* indicates that even were injunctive relief against the President possible, it "would require an express statement by Congress" authorizing such relief "[o]ut of respect for the separation

of powers and the unique constitutional position of the President." *Franklin*, 505 U.S. at 800–01. Plaintiffs have identified no such "express statement" because none exists. In all events, the question whether the President can be enjoined to perform a "ministerial" duty is beside the point. As Defendants have explained, "there is nothing 'ministerial' about the President's role in obtaining the numbers used in [the apportionment] formula." Def. Mem. at 45. Indeed, *Franklin* squarely held as much. *See Franklin*, 505 U.S. at 799 ("The admittedly ministerial nature of the apportionment calculation itself does not answer the question whether the apportionment is foreordained by the time the Secretary gives her report to the President. To reiterate, § 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in "the decennial census"; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report.").

Simply put, "[a] court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Newdow*, 603 F.3d at 1012.

IV. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs do not address, and therefore concede, the fact that they are not entitled to injunctive relief based on their supposed enumeration injuries. *Compare* Def. Mem. at 52–56 *with* Pl. Opp. at 35–36. Instead, they generally hinge their entitlement to injunctive relief on their supposed apportionment injuries. But, as Defendants explained in their opening brief, any such apportionment injuries are neither imminent nor irreparable. Def. Mem. at 51–52. Plaintiffs do not dispute that their "expert does not—and cannot—predict what apportionment injury anyone might suffer from some hypothetical smaller exclusion, assuming anyone suffers any apportionment injury at all." *Id.* at 51. And they offer no substantive response to the multiple Supreme Court cases considering post-apportionment challenges. *See id.* at 51–52; *Evans*, 536 U.S. at 463 ("Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several

months would remain prior to the first post–2000 census congressional election."). Even the *New York* court declined to hold that the apportionment injury presented an Article III injury, much less justify injunctive relief.

Plaintiffs argue that "apportionment injuries resulting from unlawful statistical sampling are irreparable," Pl. Opp. at 35, but they cannot explain why that would be the case, in light of *Franklin*, *Evans*, and other post-apportionment cases. Again, Plaintiffs confuse irreparable injuries to enumeration *procedures* with remediable injuries to apportionment. *See generally supra* Part II.A (explaining the procedure/apportionment distinction).

In short, even assuming *arguendo* that Plaintiffs can demonstrate *some* injury, that injury is not *imminent*, and certainly not *irreparable*. Especially as "an injunction would impede the Executive's historic discretion in conducting both the census and the apportionment, contrary to Congressional intent," Def. Mem. at 56, Plaintiffs are not entitled to injunctive relief.

Plaintiffs also represent that "[t]he Government does not dispute that, if Plaintiffs prevail on the merits . . . they are entitled to a declaratory judgment." Pl. Opp. at 36. Although Plaintiffs briefly requested declaratory relief in their motion, they completely failed to address it in their brief. Declaratory relief is discretionary and is based on a variety of factors, none of which Plaintiffs have acknowledged, let alone addressed. *See Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 689, 696–97 (D.C. Cir. 2015). By making only a "fleeting reference" to declaratory relief in their motion, they have "forfeited the claim." *Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016).

CONCLUSION

For the foregoing reasons and for the reasons in Defendants' opening brief: (i) this action should be dismissed for lack of subject-matter jurisdiction or, in the alternative, because Plaintiffs fail to state a single claim; and (ii) Plaintiffs' motion for partial summary judgment should be denied.

DATED: September 23, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

SOPAN JOSHI
Senior Counsel to the
Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

DIANE KELLEHER
BRAD P. ROSENBERG
Assistant Branch Directors

/s/ Elliott M. Davis
DANIEL D. MAULER
ELLIOTT M. DAVIS
Trial Attorneys
Civil Division, Federal Programs Branch
U.S. Department of Justice
1100 L St. NW
Washington, DC 20005
Phone: (202) 353-5639
Fax: (202) 616-8470
E-mail: elliott.m.davis@usdoj.gov

Counsel for Defendants