UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

COMMON CAUSE, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	No. 1:20-cv-02023-CRC

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, EXPEDITED TRIAL ON THE MERITS

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Plaintiffs Common Cause, et al. ("Plaintiffs") hereby move pursuant to Fed. R. Civ. P. 56 for partial summary judgment with respect to Counts I, IV, and V of their First Amended Complaint (ECF No. 28). In the alternative, if the Court determines that any genuine dispute(s) of material fact prevent entry of summary judgment, Plaintiffs request an expedited trial on the merits with respect to such dispute(s).

PRELIMINARY STATEMENT

Under the Constitution and Census Act, representatives in the U.S. House must be "apportioned among the several States according to their respective numbers, ***counting the whole number of persons in each State***." U.S. Const., amend. XIV, § 2, cl. 1 (emphasis added); *see also* 2 U.S.C. §2a(a). Consistent with that command, from the ratification of the Constitution in 1788 to the present day, all human beings residing in each state have been counted by the census and included in the congressional apportionment base. Only two exceptions have ever been made, both also based in the Constitution's plain text: notoriously, slaves were counted as three-fifths of a person (though that clause was stricken in 1868), and "Indians not taxed" were excluded altogether (though such persons no longer exist). No President has ever maintained that other, implicit exceptions have been lurking in the Constitution for the last 232 years.

Until now. On July 21, 2020, President Donald J. Trump issued a memorandum titled *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census* (the "Memorandum"). Breaking with the plain text of the Constitution and the Census Act, as well as centuries of practice, the Memorandum declared that it was now "the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act." The Memorandum also announced that, upon completion of the 2020 census, the President will "exclude" such persons when preparing ap-

portionment tables for transmission to Congress, and it ordered the Department of Commerce to assist him in carrying out that plan.

The Memorandum is unlawful in multiple respects. For starters, the Constitution compels the inclusion of undocumented immigrants in the apportionment base. Again, the plain text of both Article I, § 2 and the Fourteenth Amendment states that the apportionment base shall consist of "the whole number of persons in each state," and whatever their status under federal immigration law, undocumented immigrants are "people." The contemporaneous statements of the Founding Fathers and the framers of the Fourteenth Amendment reflect this same understanding. All three branches of government have explicitly and repeatedly recognized it. And over two centuries of consistent practice confirm it.

The Census Act also commands that apportionment calculations be based on "the whole number of persons in each state." 2 U.S.C. §2a(a). Congress assigned the task of performing those calculations to the President, but that task they delegated was purely a ministerial one. Congress did not grant the President authority to unilaterally remove categories of "persons" from the apportionment base when performing those calculations. The Memorandum, therefore, is not just unconstitutional; it also exceeds the President's statutory authority and is *ultra vires*.

Finally, even if it were not inherently unlawful to exclude undocumented immigrants from the apportionment base, the Memorandum cannot be implemented lawfully because Defendants lack an actual count of undocumented immigrants in each State. Article I, § 2 demands that all data used in the apportionment process be generated through "actual Enumeration"—*i.e.*, direct, household-by-household inquiry—rather than estimation or other substitute processes. Statutory law adds to this requirement by prohibiting the use of statistical sampling in connection with apportionment. *See* 13 U.S.C. § 195. Absent a direct headcount of undocumented immi-

grants, anything that Defendants might do to implement the Memorandum would necessarily violate these constitutional and statutory requirements.

In sum, the President does not have the power to order a sea change in how legislative power is allocated in this country by unilaterally declaring that disfavored groups are not "persons" under the Constitution and stripping the states where they reside of the representation to which they are entitled. The Memorandum, and any attempt by Defendants to implement it, should be declared unlawful and enjoined.

BACKGROUND

A. Throughout American History, All Immigrants Have Been Included in the Congressional Apportionment Base

From the ratification of the Constitution until today, no one has ever been excluded from the congressional apportionment base based on their citizenship or compliance with immigration laws. To the contrary, throughout American history, noncitizen immigrants (both documented and undocumented) have been counted in every census and in the base for every resulting congressional apportionment. Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts ("Stat.") ¶ 1; *see also Fed'n. for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.) (three-judge court) (stating that, for over "two centuries," the "population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders"), *appeal dismissed*, 447 U.S. 916 (1980).

B. Partisans Seek to Exclude Noncitizens from Apportionment

As described further below, proposals to exclude noncitizens from congressional apportionment have periodically been advanced over the years. They have all been roundly rejected. But that has not stopped the idea from resurfacing.

The latest effort to shrink the apportionment base began in 2014. Backed by a prominent activist, two Texas voters filed a lawsuit alleging that the Constitution *requires* states to exclude persons ineligible to vote (including noncitizens) when apportioning state legislative bodies. *See Evenwel v. Perry*, No. A-14-CV-335, 2014 U.S. Dist. LEXIS 156192, at *8 (W.D. Tex. Nov. 5, 2014) (three-judge court); Emily Bazelon and Jim Rutenberg, *The Next Big Voting-Rights Fight*, New York Times Magazine, Dec. 31, 2015, https://nyti.ms/3kYA3jg. The Supreme Court unanimously rejected that claim. *See Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). As the Court observed, the Fourteenth Amendment expressly includes all people in the congressional apportionment base; "[i]t cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis." *Id.* at 1129.

As part of the same strategic push, while *Evenwel* was pending before the Supreme Court, a partisan political strategist named Dr. Thomas Hofeller prepared a study analyzing "how a switch from the current norm of drawing legislative districts of equal total population … to using [eligible-voter population] data … could shift political power." *Kravitz v. Dep't of Commerce*, 382 F. Supp. 3d 393, 398 (D. Md. 2019); Stat. ¶ 2. Dr. Hofeller concluded that excluding those ineligible to vote from the apportionment base would take power "away from Hispanic voters" and shift it to "Non-Hispanic Whites." *Kravitz*, 382 F. Supp. 3d at 398; Stat. ¶ 2. At the same time, Dr. Hofeller noted that precinct-by-precinct data on citizenship did not exist, and that "a citizenship question would need to be added to the 2020 Census" in order to "to generate the … data necessary to make this switch." *Kravitz*, 382 F. Supp. 3d at 398; Stat. ¶ 2.

C. The Administration Attempts to Add a Citizenship Question to the Census

Shortly after *Evenwel* was decided, President Donald Trump was elected. His Administration picked up Dr. Hofeller's suggestion and attempted to add a citizenship question to the

census. Two courts have found active coordination between Dr. Hofeller and the Administration in this process. *See Kravitz*, 382 F. Supp. 3d at 399 (finding that Dr. Hofeller "spoke several times" about adding the question with an advisor to the Secretary of Commerce and "worked with [him] to concoct the [Voting Rights Act] pretext that [the advisor] then provided to [the Justice Department] on the Secretary's behalf"); *New York v. Dep't of Commerce*, No. 18-cv-2921, 2020 U.S. Dist. LEXIS 89470, at *37 (S.D.N.Y. May 21, 2020) (similar); Stat. ¶¶ 3-5.

In March 2018, Secretary Ross announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019); Stat. ¶ 6. Ross's publicly stated rationale for adding the question was to help the Department of Justice "enforc[e] the Voting Rights Act." *New York*, 139 S. Ct. at 2564; Stat. ¶ 6. Soon thereafter, lawsuits were filed to block the citizenship question. After a bench trial, a federal district court in New York ruled "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *New York*, 139 S. Ct. at 2564; Stat. ¶ 7.

The Supreme Court affirmed, agreeing that "the Secretary's decision must be set aside because it rested on a pretextual basis." *New York*, 139 S. Ct. at 2573; Stat. ¶ 8. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." Instead, "the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process" as a "distraction" from his true motive. *New York*, 139 S. Ct. at 2574-76; Stat. ¶ 8.

D. After Losing the Census Case, The Administration Continues its Efforts to Remove Noncitizens from the Apportionment Base

On July 5, 2019, just days after the Supreme Court rendered its decision, President Trump admitted what the true reason for the citizenship question had always been. At a press conference, he was asked: "What's the reason … for trying to get a citizenship question on the census?" Contrary to what the Administration had maintained in the census litigation, the President answered: "Congress. You need it for Congress, for districting." Stat. ¶ 9.

With the citizenship question now quashed, the Administration sought another way to implement its goal. Thus, on July 11, 2019, the President issued Executive Order 13880, titled *Collecting Information About Citizenship Status in Connection with the Decennial Census*. 84 Fed. Reg. 33821. In that Executive Order, the President acknowledged the true reason why the Administration had been so intently set on collecting citizenship data: enabling the "design … [of] legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24; Stat. ¶ 11.

The Executive Order recognized that it was now "impossible … to include a citizenship question on the 2020 decennial census questionnaire." 84 Fed. Reg. at 33821; Stat. ¶ 12. Thus, as a backup plan, the President ordered "all executive departments and agencies" to "provide the [Commerce] Department the maximum assistance permissible … in determining the number of citizens and non-citizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective." The Executive Order also "direct[ed] the [Commerce] Department to strengthen its efforts … to obtain State administrative records concerning citizenship." 84 Fed. Reg. at 33821; Stat. ¶ 12.

E. The President Issues the Memorandum

The other shoe dropped on July 21, 2020, less than six months before the President was required to certify census results to Congress for reapportionment. On that date, the President issued a proclamation titled *Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census* (the "Memorandum"). Stat. ¶ 15. The Memorandum unilaterally declared that it is now "the policy of the United States to exclude from the [congressional] apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act…." Stat. ¶ 15. The Memorandum makes no serious attempt to square this new "policy" with the governing statutory and constitutional provisions or with over two centuries of contrary practice. Instead, it purports to justify its "policy" based on the President's own belief that "[e]xcluding … illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government." Stat. ¶ 15.

To implement this new "policy," the Memorandum states that, following the 2020 census, when the President "transmits … to the Congress" his report of the "number of Representatives to be apportioned to each State," he will unilaterally "exclude … aliens who are not in a lawful immigration status" from the base of apportionment. Stat. ¶ 18. The Memorandum further asserts that these manipulated figures created at the President's direction, and not the actual "whole number of persons in each State," as provided in the governing statute, shall then "'settle[] the apportionment' of Representatives among the States." Stat. ¶ 19.

To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce (and through him, the Commerce Department, the Census Bureau, and the Director of the Census Bureau) to "take all appropriate action … to provide information permitting the President … to carry out the policy set forth in … this memorandum." Stat. ¶ 20. Presumably, this includes providing the President with "data on the number of citi-

zens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect. Stat. ¶¶ 12-13, 20.

In an accompanying statement, President Trump declared: "Today, I am … directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." Stat. ¶ 21. He expressly linked the Memorandum to his own partisan and nativist views, stating: "There used to be a time when you could proudly declare, 'I am a citizen of the United States.' But now, the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country. This is all part of a broader left-wing effort to erode the rights of American citizens, and I will not stand for it." Stat. ¶ 21.

Two days after President Trump issued the Memorandum, his reelection campaign sent a mass email to supporters characterizing the Memorandum as an "EXECUTIVE ORDER BLOCKING ILLEGAL ALIENS FROM BEING COUNTED IN [THE] U.S. CENSUS." Stat. ¶ 22. The email went on to state that "President Trump just signed an Executive Order that will block illegal aliens from receiving congressional representation, and ultimately, being counted in the U.S. Census." Stat. ¶ 22. The email once again linked the Memorandum to the President's own partisan, nativist views, asserting that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens." Stat. ¶ 22.

F. Defendants are Now Endeavoring to Implement the Memorandum

The Commerce Department and Census Bureau have provided few public details about how they intend to calculate the number of undocumented immigrants in each state. Nevertheless, it is clear that they are actively working to do so. At a recent congressional hearing, Census Bureau Director Steven Dillingham testified that the Secretary of Commerce had already "giv[en] [the Bureau] the directive … to proceed with the requirements of the Presidential Memorandum," and that the "process [was] underway" and "moving rapidly as possible." Stat. ¶ 23.

In particular, he testified that the Bureau "ha[d] received most of the data" and that its experts were "beginning the process of looking at methodologies." Stat. ¶ 23.

STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The mere existence of some factual dispute is insufficient on its own to bar summary judgment; the dispute must pertain to a 'material' fact." *Wood v. Am. Fed'n of Gov't Employees*, 316 F. Supp. 3d 475, 480 (D.D.C. 2018), *aff'd*, 2019 WL 668337 (D.C. Cir. Feb. 12, 2019). "Nor may summary judgment be avoided based on just any disagreement as to the relevant facts; the dispute must be 'genuine,' meaning that there must be sufficient admissible evidence for a reasonable trier of fact to find for the non-movant." *Id.* "[I]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 481.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE MEMORANDUM

"For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." *New York*, 139 S. Ct. at 2565. "To have standing, a plaintiff must 'present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling.'" *Id.*

A. Plaintiffs Will Imminently Suffer Injury-in-Fact

As the Amended Complaint reflects, this case involves a number of different plaintiffs and several distinct theories of harm. But because only "one plaintiff" need demonstrate standing, Plaintiffs focus here on (1) the plaintiffs who are individual voters and (2) a membership

organization, Common Cause, whose members include voters in every state. Stat. ¶¶ 27, 32-51.[1] To simplify matters further, Plaintiffs focus on just one form of harm: vote dilution.

The Supreme Court has held that voters who live in a state that is "expected [to] los[e] … a Representative" due to a challenged apportionment practice "undoubtedly satisf[y] the injury-in-fact requirement of Article III standing," because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999) (citation omitted) (finding that "[w]ith one fewer Representative, Indiana residents' votes will be diluted"). Indeed, for purposes of Plaintiffs' claim regarding statistical sampling, it is sufficient that a Plaintiff "reside[] [in] a State whose congressional representation or district could be changed as a result of the use of [the challenged] statistical method." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998 ("1998 Appropriations Act"), § 209(d)(1), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note).

The first question, then, is whether at least one plaintiff or Common Cause member lives in a state that is "expected [to] los[e]" a House seat if the Memorandum is implemented. The answer to that question is yes. Stat. ¶¶ 27, 32-51. Plaintiffs' expert, Dr. Christopher Warshaw, conducted an analysis showing that, if undocumented immigrants are removed from the apportionment base, several states are likely to lose seats. Stat. ¶¶ 58-63; *cf. House of Representatives*, 525 U.S. at 330 (holding that an Indiana voter-plaintiff demonstrated standing via an expert analysis showing that "it [was] a virtual certainty that Indiana [would] lose a seat … under the

[1] Common Cause has standing to sue on behalf of its members because those members are individual voters who "would otherwise have standing to sue in their own right," Stat. ¶¶ 27, 32-35, 39, 41, 43, 46, 47, 50, 51; the "interests at stake" in this litigation "are germane to [its] purpose" as a nonprofit that promotes democracy and good government, Stat. ¶¶ 28-31; and "neither the claim asserted nor the relief requested requires participation of [its] individual members in the lawsuit." *Friends of Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

[Commerce] Department's Plan"); *id.* at 332-33 (holding that other voter-plaintiffs demonstrating standing via an expert analysis showing that "it [was] substantially likely" that voters in their counties "w[ould] suffer vote dilution … as a result of the [Bureau's] Plan").

As Dr. Warshaw showed, Texas—the home state of multiple named voter-plaintiffs—has the highest likelihood of losing a seat, at 98%. Stat. ¶¶ 38, 41, 59. Dr. Warshaw also determined that the probability that ***at least one*** of the five states where the voter-plaintiffs live (Texas, California, New Jersey, New York, and Florida) would lose a seat was 100%. Stat. ¶¶ 33-51, 60. Likewise, because Common Cause has members in every state, Dr. Warshaw determined that the probability that at least one U.S. state would lose a seat was also 100%. Stat. ¶¶ 27, 32, 63. If that were not enough, the Memorandum states on its face that, under its new "policy," one state will likely lose "two or three … congressional seats." Stat. ¶ 16. It is clear from context that this state is California, where multiple named voter-plaintiffs live—but whichever state it is, Common Cause has members there. Stat. ¶¶ 27, 32, 36-37, 39, 42, 45, 59. All of this demonstrates that the dilution of at least one Plaintiff's vote (or the vote of one Common Cause member) is a "virtual certainty"—and *a fortiori*, that it is "substantially likely." *House of Representatives*, 525 U.S. at 330, 332-33. Surely it "could" occur. 1998 Appropriations Act, § 209(d)(1), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note).

The only remaining question is whether the implementation of the Memorandum is sufficiently "imminent." *New York*, 139 S. Ct. at 2565. Again, the answer is yes. The deadline for the President to prepare and transmit apportionment tables to Congress is in January 2021—less than five months from now. Stat. ¶ 25. Even if there were some possibility that the President might change his mind between now and then, that would not defeat standing. All that is required is a "substantial risk" that the Memorandum will be implemented. *Susan B. Anthony List*

v. Driehaus, 573 U.S. 149, 158 (2014); *see also N.Y. Republican State Comm. v. SEC*, 927 F.3d 499, 504-05 (D.C. Cir. 2019) (discussing "substantial risk" standard); *see, e.g.*, *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 517-18 (N.D. Cal. 2017) (holding that California counties had standing to challenge President Trump's Executive Order on sanctuary cities, even though the government "ha[d] not yet designated [them] as 'sanctuary jurisdictions' or withheld funds," as there was a "credible threat" of enforcement), *aff'd*, 897 F.3d 1225 (9th Cir. 2018).

That "substantial risk" test is easily met here. For starters, "[i]n assessing whether enforcement [of a presidential directive] is likely, courts look to … the government's statements and representations." *Id.* at 521. Here, the Memorandum declares on its face that it is "***the policy of the United States*** to exclude [undocumented immigrants] from the apportionment base … ***to the maximum extent feasible***." Stat. ¶ 15 (emphasis added). It also announces the President's intent "to carry out the policy set forth … in th[e] [M]emorandum." Stat. ¶ 20; *cf. League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 998 (D. Alaska 2018) (finding standing to challenge an Executive Order that had not yet been implemented, where "[t]he Executive Order itself demonstrate[d] that the … activities [that it authorizes] are intended to be imminent").

In his accompanying public statement, the President stated unequivocally that he was "***directing*** the Secretary of Commerce ***to exclude*** illegal aliens from the apportionment base following the 2020 census." Stat. ¶ 21. And his reelection campaign told Americans in no uncertain terms that "President Trump just signed an Executive Order that ***will*** block illegal aliens from receiving congressional representation." Stat. ¶ 22. Since then, neither the President nor any of the other Defendants has "disavowed [the] intention" to implement it. *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir. 2020); Stat. ¶¶ 23-24. To the contrary, as the Director of the Census Bureau testified to Congress, the Secretary of Commerce has already

"giv[en] [the Bureau] the directive … to proceed with the requirements of the Presidential Memorandum," and that "process is underway." Stat. ¶ 23.

In evaluating imminence, courts also consider "the past conduct of the government." *Cnty. of Santa Clara*, 250 F. Supp. 3d at 521. This Administration has already gone to great efforts to exclude noncitizens from apportionment. Secretary Ross added a citizenship question to the census, misled the public and the courts about the reason, and litigated the issue all the way to the Supreme Court. Stat. ¶ 3-8. After the Supreme Court blocked that path, the President immediately issued an Executive Order declaring it "imperative" that "all agencies … share information" about citizenship with the Commerce Department. Stat. ¶ 12. The Memorandum was the next step in this effort. Finally, on August 3, 2020—less than two weeks after the Memorandum was issued—the Census Bureau abruptly reversed its earlier decision to extend all census deadlines in light of the COVID-19 pandemic, shortening data collection by a month and putting the integrity of the decade-long census effort at severe risk. The Administration offered no public explanation for this sudden about-face, but the only plausible motivation is to ensure that the count is finalized in time for President Trump to implement the Memorandum before his current term in office ends on January 20, 2021. Stat. ¶ 25. All of this history confirms that Defendants are deeply committed to the policy set forth in the Memorandum and will make every effort to implement it. *A fortiori*, there is a "substantial risk" that they will do so.

Finally, Congress has expressed its view that challenges to statistical methods employed in the census be resolved as early as possible—and that view matters. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (noting that "Congress['s] … judgment is … instructive and important" when assessing injury-in-fact). In particular, Congress found that "it would be impracticable for … the courts of the United States to provide[] meaningful relief after [the census]

has already been conducted." *See* 1998 Appropriations Act § 209(a)(8), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note). It determined that an "Operational Plan" of the Census Bureau is "sufficiently concrete and final to … be reviewable in a judicial proceeding" even before its implementation. *Id.* § 209(c)(2). And it provided that "[i]t shall be the duty" of the Article III courts "to expedite to the greatest possible extent the disposition" of any challenge to such a statistical method. *Id.* § 209(e)(2). Article III's imminence requirement must be interpreted with these directives in mind.

B. Plaintiffs' Injuries are Fairly Traceable to the Challenged Conduct

The traceability element of standing requires "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, there is no question that Plaintiffs' impending loss of representation in Congress is "fairly traceable" to the implementation of the Memorandum. Both Dr. Warshaw's analysis and the Memorandum's own language show that the exclusion of undocumented immigrants from the apportionment base is intended to cause, and will cause, the loss of representation at issue. *Cf. House of Representatives*, 525 U.S. at 332 ("[A]s [Plaintiffs' expert's] affidavit demonstrates, … [t]here is undoubtedly a 'traceable' connection between the [challenged apportionment practice] and Indiana's expected loss of a Representative").

C. Plaintiffs' Injuries are Redressable

Finally, the redressability element of standing requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. Here, an injunction prohibiting Defendants from implementing the Memorandum would prevent the harm of which Plaintiffs complain. *Cf. House of Representatives*, 525 U.S. at 332 ("[T]here is a substantial likelihood that the requested relief—a permanent injunction against the proposed uses of sampling in the census—will redress the alleged injury.").

Plaintiffs recognize that the law is somewhat unclear as to whether and when the President himself may be enjoined. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992). However, even if this Court may not enjoin the President, that does not defeat redressability. The Court may still enjoin the other Defendants, and all others working with the President, from providing him with the data and assistance necessary to carry out the Memorandum. Moreover, the Court "may assume it is substantially likely that the President … would abide by an authoritative interpretation of the census statute and [relevant] constitutional provision[s] …, even [if he] would not be directly bound by such a determination." *Id.* at 803; *see also Adams v. Clinton*, 90 F. Supp. 2d 35, 43-44 (D.D.C. 2000) (three-judge court).

II. THE MEMORANDUM VIOLATES THE CONSTITUTION BY EXCLUDING UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE

A. Article I, Section 2 Requires Inclusion of Undocumented Immigrants in the Apportionment Base

As originally ratified, the Constitution provided that "Representatives" in the U.S. House "shall be apportioned among the several States … according to their respective Numbers, which shall be determined by adding to the ***whole Number of free Persons***, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const., art. I, § 2, cl. 3 (emphasis added). In other words, "Indians not taxed" were excluded from the apportionment base altogether, and slaves (*i.e.*, "other Persons") were counted as a fraction of a "free person." But the Framers did not exclude anyone else—such as noncitizens.

As this Court has previously recognized, the presence of these two express exclusions signifies that no other, implicit exclusions were intended—*i.e.*, that "the whole number of free persons" was meant to be "all-inclusive." *FAIR*, 486 F. Supp. at 576; *cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (discussing and applying the canon *expressio unius est exclusio alterius*). Undocumented immigrants "are clearly 'persons,'" and thus within the compass of the

Framers' language. *FAIR*, 486 F. Supp. at 576; *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' [within the meaning of] the Fifth and Fourteenth Amendments."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment's references to "persons" are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of … nationality").

The Framers' contemporaneous statements point to the same conclusion. Madison stated that it was "a fundamental principle of the proposed Constitution, that … the aggregate number of representatives allotted to the several States [would] be determined by a federal rule, founded on the aggregate number of ***inhabitants***," The Federalist No. 54 (emphasis added)—not, for example, the aggregate number of "citizens," or "persons in compliance with federal immigration law." Indeed, Madison recognized that "in every State, a certain proportion of inhabitants"—noncitizens included—"are deprived of [the] right [to vote]," but that they would nonetheless "be included in the census by which the federal Constitution apportions the representatives." *Id.*; *see also Evenwel*, 136 S. Ct. at 1127. Madison was not alone: "[e]ndorsing apportionment based on total population, Alexander Hamilton declared: 'There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government.'" *Id.* (quoting 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911)).

B. The Fourteenth Amendment Requires Inclusion of Undocumented Immigrants in the Apportionment Base

Any doubt about the original intent of the Founding Fathers was dispelled by the ratification of the Fourteenth Amendment following the Civil War. That amendment eliminated the

odious "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128.

Specifically, the Fourteenth Amendment provided that "Representatives shall be apportioned among the several States according to their respective numbers, counting the ***whole number of persons*** in each State, excluding Indians not taxed." U.S. Const., amend. XIV, § 2, cl. 1 (emphasis added).[2] Notably, Congress used the word "persons," not "citizens," in the apportionment formula—even though it used "citizens" in other provisions of the Fourteenth Amendment. *See, e.g.*, *id.* § 1 (providing that states may not "abridge the privileges or immunities of ***citizens*** of the United States," but that all "***person[s]***" in the United States are entitled to due process and equal protection (emphasis added)). That choice was intentional.

During the debates over the Fourteenth Amendment, Congress considered this apportionment formula at length. *See Evenwel*, 136 S. Ct. at 1127-28. In particular, Congress debated whether to revise it to exclude persons ineligible to vote—a category, all recognized, that included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess. 1256 (1866) (remarks of Sen. Wilson). The proposal was driven by the fact that substantial immigration from Europe to the Northeast had resulted in a high concentration of unnaturalized immigrants in those states. *See* Joseph B. James, *The Framing of the Fourteenth Amendment* 23, 185 (1956).

The proposal was soundly rejected, however, on the ground that "non-voting classes"—immigrants included—"have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (remarks of Rep. Blaine)). Senator Johnson of Maryland explained that non-

[2] Although the "Indians not taxed" exception remains, no such persons have existed for many years. *See* Dep't of Commerce, *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69366, 69372 (Oct. 20, 1980) ("Since the passage of the income tax laws, there are no longer any Indians not taxed … to be excluded from the apportionment population.").

voters are among those whom the government represents, and "the basis of representation" must depend upon "the entire number of people to be represented." Cong. Globe, 39th Cong., 1st Sess. 2767-68 (1866). As the amendment's lead drafter, Representative Bingham of Ohio, made clear: "Under the Constitution as it now is and as it always has been, ***the entire immigrant population*** of this country is included in the basis of representation," including those "not naturalized." *Id.* at 432 (emphasis added).

C. Congressional Action Since the Fourteenth Amendment Confirms that Undocumented Immigrants Must be Included in the Apportionment Base

On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and apportionment base. All such proposals have failed, as it was "generally accepted that such a result would require a constitutional amendment." *FAIR*, 486 F. Supp. at 576-77.

For example, in advance of the 1930 census, Congress considered removing "aliens" from the apportionment base. *See* New York Times, *Census Bill Passed; Amendments Killed*, June 7, 1929, https://nyti.ms/2FtL1wV. This proposal "was known as the Evans plan after the head of the Ku Klux Klan, Hiram Wesley Evans." Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s* 70 (2010). But the Senate Legislative Counsel concluded that "statutory exclusion of aliens from the apportionment base would be unconstitutional," and the proposal failed. *FAIR*, 486 F. Supp. at 576-77 (citing 71 Cong. Rec. 1821 (1929)).

Again in 1940, Congress considered whether "aliens who are in this country in violation of law have the right to be counted and represented." *FAIR*, 486 F. Supp. at 576-77 (quoting 86 Cong. Rec. 4372 (1940)). Representative Emanuel Celler of New York explained:

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers…. We count the convicts who

> are just as dangerous and just as bad as the Communists or as the Nazis, ***as those aliens here illegally***, and I would not come here and have the temerity to say that the convicts shall be excluded, if the founding fathers say they shall be included….

Id. (emphasis added). On that basis, Congress rejected the proposal. *Id.*

Once again in 1980, the subject arose in Congress. In opposition to exclusion, Senator Jacob Javits of New York explained that the Constitution permitted no apportionment rule "other than as described in the Federalist papers, the aggregate number of inhabitants, which includes aliens, ***legal and illegal***." 1980 Census: Counting Illegal Aliens: Hearing Before the S. Subcomm. on Energy, Nuclear Proliferation, & Fed. Services of the Comm. on Gov't Affairs, 96th Cong. 10 (1980) (emphasis added). Once again, Congress failed to enact the proposal.

D. The Executive Branch Has Repeatedly Stated that Excluding Undocumented Immigrants from the Apportionment Base Would Violate the Constitution

The Executive Branch—under Presidents of both parties—has repeatedly agreed that the Constitution requires that noncitizens, including undocumented immigrants, be included in the congressional apportionment base.

For example, in 1980, under Democratic President Jimmy Carter, certain plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the apportionment base. *FAIR*, 486 F. Supp. at 565. Opposing the suit, the U.S. Department of Justice ("DOJ") told this Court that the plaintiffs "s[ought] a radical revision of the constitutionally mandated system for allocation of Representatives to the States of the Union and an equally radical revision of the historic mission of the decennial census." Federal Defendants' Post-Argument Mem. at 1, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

"[F]or 200 years," the DOJ told this Court, "the decennial census has counted all residents of the states irrespective of their citizenship or immigration status," and those counts had been employed in apportionment. *Id.* Given "the clear and unequivocal language of Section 2 of

the Fourteenth Amendment," the DOJ urged, the "radical revision" that the plaintiffs sought could come only from "a constitutional amendment." *Id.* What is more, the DOJ explained, such a revision would be "patently unfair" to residents of communities in which undocumented immigrants live, as undocumented immigrants "demand[] precisely the same level of the services from the municipalities and states in which [they] reside as do all other citizens." *Id.* at 12.

In 1988, under Republican President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on another proposal to exclude "illegal aliens" from congressional apportionment. The DOJ again concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[3] In the DOJ's view, it was "clear" that, under the Fourteenth Amendment, "all persons, ***including aliens residing in this country***, [must] be included" in the apportionment base. *Id.* at 2 (emphasis added). The DOJ noted that the Reconstruction Congress "rejected arguments that representation should be based on people with permanent ties to the country" and "consciously chose to include aliens." *Id.* at 2-3. Moreover, the DOJ explained, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully present in the United States. *Id.* at 3-4 (citing *Plyler*, 457 U.S. at 210).

In 1989, under Republican President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the [DOJ] concerning the constitutionality of proposed legislation excluding illegal … aliens from the decennial census count." Letter from Carol T. Crawford, Assistant Attorney General, dated Sept. 22, 1989, at 1, 135 Cong. Rec. S12235 (1989). The DOJ responded that "section two of the Fourteenth Amendment which pro-

[3] *Included in* 1990 Census Procedures and Demographic Impact on the State of Michigan: Hearing Before the Committee on Post Office and Civil Service, House of Representatives, 100th Cong., 2d Sess., June 24, 1988 at 240.

vides for 'counting the whole number of persons in each state' and the original Apportionment and Census Clauses of Article I section two of the Constitution ***require that inhabitants of States who are illegal aliens be included*** in the census count." *Id.* (emphasis added).

In 2015, under Democratic President Barack Obama, the DOJ once again took the position—this time in briefing to the Supreme Court—that Article I, § 2 and the Fourteenth Amendment "were purposely drafted to refer to 'persons,' rather than to voters, and to include people who could not vote"—specifically including "aliens." Brief for the United States as *Amicus Curiae*, *Evenwel v. Abbott*, No. 14-940, at 18 (quoting Cong. Globe, 39th Cong., 1st Sess. 141, 359), 2015 U.S. S. Ct. Briefs LEXIS 3387 (filed Sept. 25, 2015). In the DOJ's words, this is because "the federal government act[s] in the name of (and thereby represent[s]) all people, whether they [are] voters or not, and whether they [are] citizens or not." *Id.* at 19.

Multiple Directors of the Census Bureau, serving under Presidents of both parties, have expressed the same position. In a recent hearing before the House Committee on Oversight and Reform, four former Directors of the Bureau testified that exclusion of undocumented immigrants from the apportionment base would be unconstitutional.[4] Those who so testified were:

- Vincent Barabba, Director of the Census Bureau from 1973–76 and 1979–81, under Presidents Nixon, Ford, and Carter, who oversaw the 1980 census;
- Kenneth Prewitt, Director of the Census Bureau from 1998–2001, under President Clinton, who oversaw the 2000 census;
- Robert M. Groves, Director of the Census Bureau from 2009–12, under President Obama, who oversaw the 2010 census; and
- John H. Thompson, Director of the Census Bureau from 2013–17, under Presidents Obama and Trump, who prepared for the 2020 census.

[4] Counting Every Person: H'g on Safeguarding the 2020 Census Against the Trump Administration's Unconstitutional Attacks Before the House Comm. on Oversight & Reform, 116th Cong. (2020), https://www.youtube.com/watch?v=SKXS8e1Ew7c.

Political appointees of the present Administration excluded, Plaintiffs are not aware of anyone in the DOJ or Census Bureau who has ever taken the opposite view.

E. The Judiciary Has Confirmed that Excluding Undocumented Immigrants from the Apportionment Base Would be Unconstitutional

The judiciary, too, has echoed this consensus. For over fifty years, the Supreme Court has found it "abundantly clear … that in allocating Congressmen the number assigned to each state should be determined solely by the number of the State's ***inhabitants***"—*i.e.*, not by the number of citizens or voters. *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964) (emphasis added). Just four years ago, the Supreme Court reaffirmed that the Constitution "select[s] … ***total population*** as the basis for allocating congressional seats, … whether or not [individuals] qualify as voters." *Evenwel*, 136 S. Ct. at 1129 (emphasis added). Because undocumented immigration was at the center of the controversy in *Evenwel*, the Supreme Court surely had those persons in mind as part of the "total population" when it made this declaration.[5]

Lower courts, including a three-judge panel of this Court, have also determined that "illegal aliens … are clearly 'persons,'" and that "the population base for purposes of [congressional] apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *FAIR*, 486 F. Supp. at 576 (emphasis added); *see also New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019) (observing that "the Constitution mandates that [the Census must] count every single person residing in the United States … whether living here with legal status or without," and that "[t]he population count derived from

[5] *Compare* Brief of City of Los Angeles et al. as *Amicus Curiae* for Appellees, *Evenwel v. Abbott*, No. 14-940 (filed Sept. 25, 2015), at 21-22 (discussing the rights of undocumented immigrants as members of the political community) *with* Br. of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940 (filed Aug. 7, 2015), at 1 (complaining of the "harms … posed by mass migration to the United States, both lawful and unlawful").

that effort is used … to apportion Representatives"), *aff'd in relevant part*, 139 S. Ct. 2551 (2019). To Plaintiffs' knowledge, no court has ever held otherwise.

F. 232 Years of Unbroken Practice Confirm This Reading of the Constitution

What the above sources suggest, "settled practice confirms." *Evenwel*, 136 S. Ct. at 1132. To wit, immigrants—whether documented or undocumented—have in fact been counted in every census, and included in every congressional apportionment, since the Constitution was ratified in 1788. *FAIR*, 486 F. Supp. at 576; Stat. ¶ 1. Such "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of [the relevant] constitutional provisions…." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); *see also New York*, 139 S. Ct. at 2567 ("[In the census context], as in other areas, our interpretation of the Constitution is guided" by "early understanding of and long practice").

G. The Memorandum's Constitutional Reasoning is Meritless

The Memorandum makes no effort to square its "policy" with any of this. Instead, it declares that the relevant constitutional language—"the whole number of persons in each State"—is ambiguous, and that "[d]etermining" its true meaning "requires the exercise of judgment." Stat. ¶ 17. To the contrary, as this Court has found, "[t]he language of the constitution is not ambiguous" on this question. *FAIR*, 486 F. Supp. at 576.

The Memorandum's attempt to create ambiguity in that language is sophistic. It points out that "aliens who are only temporarily in the United States, such as for business and tourism, and certain foreign diplomatic personnel are 'persons' who have been excluded from the apportionment base in past censuses." Stat. ¶ 17. From this, the Memorandum speciously reasons that there must be leeway to exclude other categories of "persons," such as undocumented immigrants. But both of the Memorandum's purported examples are easily explained.

All that the "foreign visitors" example shows is that a state's "numbers," as a matter of plain meaning, encompasses all the people—and only the people—who actually ***live*** there. That is how the Framers understood the Constitution's language. *See* Madison, The Federalist No. 54 (stating that the "number of representatives allotted" to a state would be "determined by … [its] aggregate number of ***inhabitants***" (emphasis added)). That is how the first Congress understood the Constitution's language when it drafted the original Census Act. *See* Census Act of Mar. 1, 1790, § 5, 1st Cong., 2d Sess. (specifying that persons be enumerated at their "usual place of abode," *i.e.*, "that place in which [they] usually reside[]").

That is how the Census Bureau understood its constitutional mandate throughout the intervening centuries. *See* Statement of John G. Keane, Director of the Census Bureau, *Enumeration of Undocumented Aliens in the Decennial Census*, H'g Before the Subcommittee on Energy, Nuclear Proliferation, and Gov't Processes of the Senate Committee on Govt'l Affairs, 99th Cong., 1st Sess., Sept. 18, 1985, at 22-23. And that is how the Census Bureau understood its mandate for purposes of conducting the 2020 census after full notice-and-comment rulemaking. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018) (stating that "[t]he state in which a person resides" for purposes of the census is "the place where [that] person lives and sleeps most of the time"). In sum, "foreign tourists … do not 'reside' here." *FAIR*, 486 F. Supp. at 567. Undocumented immigrants do.[6]

The example of foreign diplomatic personnel does not help the Defendants either. The Memorandum acknowledges that only "certain" such personnel have been excluded from apportionment. Conveniently, however, it fails to note which ones those are: diplomats living in for-

[6] *See* Jynnah Radford, Key Findings About U.S. Immigrants, Pew Research Ctr. (June 17, 2019), https://perma.cc/USU7-L9BM (noting that, in 2017, 66% of "unauthorized immigrants" had lived in the United States more than 10 years).

eign nations' embassies. *See FAIR*, 486 F. Supp. at 567 ("everyone is counted except foreign diplomatic personnel living on embassy grounds"); Statement of John G. Keane, *supra*, at 24 (same). As a matter of international law, foreign embassies have long been "considered 'foreign soil,' and thus not within any state." *Id.*; *see also United States v. Corey*, 232 F.3d 1166, 1182 (9th Cir. 2000) (noting that historically, "the official residences of envoys were in every respect considered to be outside the territory of the receiving state" (quoting 1 Oppenheim's International Law § 494, at 1076 (Robert Jennings & Arthur Watts eds., 9th ed. 1992))). Thus, the exclusion of foreign embassy residents from the apportionment base does not create any constitutional ambiguity or imply any authority to exclude immigrants who do, in fact, live on U.S. soil.

In any event, if there were any ambiguity in the Constitution, the body entitled to exercise "judgment" in this area would be Congress—not the President. The Constitution places the task of apportionment within Article I, which deals with the powers of Congress, since that task determines the composition of Congress itself. Article II, which deals with the President's powers, says nothing about apportionment. This is no accident: the Framers were deeply concerned about the "concentration of the several powers [of government] in the same department [*i.e.*, branch]," and they took pains prevent any one branch from exercising undue influence over another. James Madison, The Federalist No. 51 (1788).

Relevant here, to help ensure that "each department [w]ould have a will of its own," the Framers endeavored to give "the members of each [department] . . . as little agency as possible in the appointment of the members of the others." *Id.*; *cf.* U.S. Const., art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."). If the President had inherent power to exercise "judgment" regarding the legislative apportionment base, he could alter the composition of the House of Representatives at his whim, thereby ag-

grandizing power to the executive. That would have been anathema to the Framers, and the Constitution gives the President no such power.

* * *

For all of the above reasons, Article I, § 2 and the Fourteenth Amendment require that undocumented immigrants—like all other "persons"—be included in the Congressional apportionment base. The Memorandum, therefore, is unconstitutional and should be enjoined.

III. THE MEMORANDUM VIOLATES FEDERAL STATUTES BY EXCLUDING UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE

For much the same reasons that the Memorandum violates the Constitution, it also violates 13 U.S.C. § 141 and 2 U.S.C. § 2a, the statutes that Congress has duly enacted to regulate the census and apportionment.

A. The Statutory Scheme Requires the President to Calculate Apportionment Using "the Whole Number of Persons in Each State"

The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census and the resulting apportionment shall occur. *See* U.S. Const., art. I, § 2, cl. 3. Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and the Census Bureau acting under him or her. *See* 13 U.S.C. §§ 2, 4, 141. As is well known, the Census Bureau sends a questionnaire to every household in the United States, to which every resident (documented or otherwise) is legally required to respond. *See* 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states. Within nine months of the census date (in this case, by December 31, 2020), the Secretary of Commerce is required by statute to report to the President "the tabulation of ***total population*** by States … as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b) (emphasis added).

Thereafter, the President is required by statute to transmit to Congress two sets of numbers. First, the President must provide "a statement showing the ***whole number of persons*** in each State, excluding Indians not taxed, as ascertained under the … decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added). Second, based on that figure, the President must calculate "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." *Id.* "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress. 2 U.S.C. § 2a(b).

This statutory scheme does not authorize the Secretary of Commerce to transmit to the President for use in apportionment any number other than "the total population by States," as determined by the census. Nor does it authorize the President to base the apportionment calculation that he or she transmits to Congress on something other than "the whole number of persons in each State," as determined by the census. As discussed above, this phrasing comes straight from the Constitution itself, and there is no ambiguity about what it means.

B. The Statutory Scheme Does Not Delegate the President Any Discretion Regarding the Apportionment Base

Nor do these statutes contain an implicit grant of discretion to the President to alter the apportionment base in accordance with his personal view of what is (in the Memorandum's words) "mo[st] consonant with the principles of representative democracy."

As this Court has held, since "[t]he apportionment function" is so important to the Legislative Branch, "impact[ing] not only the distribution of representatives among the states, but also the balance of political power within the House," it is not plausible that Congress would have left such fundamental choices "to the discretion of the [Executive Branch] without a more direct congressional pronouncement." *U.S. House of Representatives v. Dep't of Commerce*, 11 F.

Supp. 2d 76, 100 (D.D.C. 1998) (three-judge court), *aff'd*, 525 U.S. 316 (1999); *cf. Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation … is not sustainable.").

The statutory history, too, underscores that Congress never delegated such discretion to the President. The present framework, under which the President calculates apportionment tables and transmits them to Congress, dates back to 1929. Before then, following each census, Congress calculated its own apportionment and enacted it through a new statute. *See Franklin*, 505 U.S. at 808-09 (Stevens, J., concurring in part). "After the 1920 census, however, Congress failed to pass a reapportionment Act" as a result of internal "deadlock." *Id.*; *see also Dep't of Commerce v. Montana*, 503 U.S. 442, 451-52 & n.25 (1992). This impasse "provided the impetus for the 1929 [Census] Act," which "established [the] self-executing apportionment [process]" that remains in place today. *See Franklin*, 505 U.S. at 809 (Stevens, J., concurring in part) (citing S. Rep. No. 2, 71st Cong., 1st Sess. 2-4 (1929)); *see also Montana*, 503 U.S. at 451 n.25.

In particular, the new Act "produced an automatic reapportionment through the application of a mathematical formula to the census." *Franklin*, 505 U.S. at 809-10 (Stevens, J., concurring in part). The original bill tasked the Secretary of Commerce with "appl[ying] [the] mathematical formula to the census figures and . . . transmit[ting] the resulting apportionment calculations to Congress." *Id.* "A later version made the President responsible for performing the mathematical computations and reporting the result." *Id.* But as this history makes clear, Congress did not intend to endow the President with discretion to make wholesale changes to the apportionment base. To the contrary, Congress's sole intention in involving the President was "to make the apportionment proceed automatically based on the census." *Id.* at 810.

Indeed, the sponsor of the 1929 Act stressed that the "function [to be] served by the President" in the apportionment determination was "***as purely and completely a ministerial function as any function on earth could be***." 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (emphasis added). The President was simply "to report 'upon a problem in mathematics … for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer.'" *Franklin*, 505 U.S. at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess. at 4-5 (1929)); *see also* S. Rep. No. 2, 71st Cong., 1st Sess. at 4 (1929) (stating that the President shall act "pursuant to a purely ministerial and mathematical formula").

The Executive Branch has similarly agreed that the President's statutory role in translating the census data to an apportionment determination is purely ministerial. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502, 1992 U.S. S. Ct. Briefs LEXIS 390 (U.S. Apr. 20, 1992), ("[I]t is true that the method … calls for application of a set mathematical formula to the state population totals produced by the census"). As now-Chief Justice Roberts argued to the Supreme Court in his capacity as Deputy Solicitor General: "The law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives [from the Secretary of Commerce]…. It would be unlawful [for the President] … just to say, 'these are the figures, they are right, but I am going to submit a different statement.'" Tr. of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992). Until now, "[n]o President—indeed, no member of the Executive Branch—has ever suggested that the statute authorizes the President to modify the census figures when he performs the apportionment calculations." *Franklin*, 505 U.S. at 812-13 (Stevens, J., concurring in part).

The courts, as well, have recognized that the Census Act gives the President "no discretion in calculating the numbers of Representatives," and that his or her role in "the apportion-

ment calculation" is therefore "admittedly ministerial"—even if his role in other aspects of the census process is not. *Franklin*, 505 U.S. at 799; *see also Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1189 (D. Utah 2004) (noting that the Census Act assigns the President "only ministerial functions, such as making apportionment calculations according to set formulae").

C. The Actions in the Memorandum are *Ultra Vires* and Should be Enjoined

For the reasons above, by ordering the Commerce Department to prepare and transmit to the President a number other than "the tabulation of total population by States" for use in the apportionment process, the President has directed the Commerce Department to violate 13 U.S.C. § 141(b). And by pledging to transmit an apportionment calculation to Congress based on something other than "the whole number of persons in each State," the President will imminently violate 2 U.S.C. § 2a(b). Thus, the entire course of action set forth in the Memorandum exceeds the statutory authority delegated to Defendants by Congress.

As the Supreme Court has explained, "[t]he responsibility of determining the limits of statutory grants of authority … is a judicial function entrusted to the Courts by Congress by the statutes establishing courts and marking their jurisdiction." *Stark v. Wickard*, 321 U.S. 288, 310 (1944). Thus, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," such as Defendants' actions here. *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command").

The D.C. Circuit, too, has recognized that "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see also Trudeau v. FTC*, 456 F.3d 178, 189-90 (D.C. Cir. 2006)

("'[J]udicial review is available when an agency acts *ultra vires*,' even if a statutory cause of action is lacking." (citation omitted)). And it has applied that principle in the specific context of presidential proclamations and executive orders, similar to the Memorandum. *See, e.g.*, *Mtn. States Legal Found. v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) (challenge to six presidential proclamations designating national monuments); *Chamber of Comm. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (invalidating executive order barring federal government from contracting with employers who hire strike-breakers).

Plaintiffs, therefore, are entitled to a declaration that the actions required by the Memorandum are unlawful and *ultra vires* and an injunction against their implementation.

IV. THE MEMORANDUM VIOLATES THE CONSTITUTION AND FEDERAL LAW BECAUSE IT CANNOT BE IMPLEMENTED VIA "ACTUAL ENUMERATION" AND MUST RELY ON PROHIBITED STATISTICAL SAMPLING

As Plaintiffs have shown, the Memorandum is unlawful on its face. But even if it were lawful in principle to exclude undocumented immigrants from apportionment, the way in which the Memorandum will be implemented by Defendants will violate independent provisions of the Constitution and statutory law. Namely, any attempt by Defendants to implement the Memorandum would necessarily violate the constitutional requirement of an "actual Enumeration" and the statutory prohibition on statistical sampling.

A. Implementing the Memorandum Would Violate the Constitutional Requirement of "Actual Enumeration"

1. *The Constitution Requires that Apportionment Data be Determined Exclusively via "Actual Enumeration"*

From the beginning, the Constitution has provided that all data used in congressional apportionment "shall be determined" via an "***actual Enumeration***." U.S. Const., art. I, § 2, cl. 3 (emphasis added).

At the time the Constitution was ratified, this phrase had a well-settled meaning. "To 'enumerate,' according to Samuel Johnson, was to 'reckon up singly' or 'count over distinctly.'" Brief for Appellee U.S. House of Representatives, No. 98-404, *Dep't of Commerce v. House of Representatives* ("1998 House Br."), 1998 WL 767637, at *45 (U.S. filed Nov. 3, 1998) (quoting A Dictionary of the English Language (4th ed. 1773)). "Similarly, Noah Webster wrote that 'to enumerate' meant '[t]o count or tell, number by number; to reckon or mention a number of things, each separately,'" and that the noun "enumeration" constituted "the act of 'counting or telling a number, by naming each particular[.]'" *Id.* (quoting 1 An American Dictionary of the English Language (1828)). The Framers underscored that they meant this requirement literally, rather than figuratively, by emphasizing that the "enumeration" must be an "actual" one.

The Supreme Court has confirmed as much, observing that "the Framers expected census enumerators to seek to reach each individual household" one by one when making determinations that bear on apportionment. *Utah v. Evans*, 536 U.S. 452, 477 (2002); *see also House of Representatives*, 525 U.S. at 346-47 (Scalia, J., concurring) (in the Framers' day, "an 'enumeration' require[d] an actual counting, and not just an estimation"). Thus, to the extent other "methods substitute for any such effort, … the Framers did not believe that the Constitution authorized their use." *Evans*, 536 U.S. at 477.

As the Supreme Court stressed just last year, "early understanding" and "long and consistent historical practice" are also important when interpreting the Enumeration Clause. *New York*, 139 S. Ct. at 2567; *see also Noel Canning*, 573 U.S. at 524. And centuries of practice, starting with the first Congress, confirm that an "actual Enumeration" requires a literal headcount. "From the very first census" in 1790, Congress required that "enumeration … be made by ***an actual inquiry at every dwelling-house … and not otherwise***." *House of Representatives*,

525 U.S. at 335 (emphasis added) (quoting Act of Mar. 26, 1810, § 1, 2 Stat. 565-566); *see also New York*, 351 F. Supp. 3d at 520 ("Since 1790, the government has conducted the required 'actual enumeration' through questions—initially asked in person by U.S. Marshals and 'specially appointed agents' and later by means of written questionnaire—… of those living in each American household."); 1998 House Br., 1998 WL 767637, at *34-35, *49-50 (similar).

Defendants have elsewhere conceded this very point. When the State of New York recently challenged the citizenship question as a violation of, *inter alia*, the Enumeration Clause, the DOJ—appearing on behalf of Defendants—maintained that "the Constitution's reference to 'actual Enumeration' is simple: population [for purposes of apportionment] is to be determined ***through a person-by-person headcount, rather than through estimates or conjecture***." Brief.in Support of Defendants' Mot. to Dismiss (ECF 155) at 30, *New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. filed May 25, 2018) (emphasis added); *see also id.* at 25 (stating that the Enumeration Clause "provides a simple judicial standard for determining the constitutionality" of a practice used in creating data used for apportionment: "***the Secretary must perform a person-by-person headcount***, rather than an estimate" (emphasis added)).

Defendants' predecessors in the Executive Branch have agreed with this view. For example, in 1980, the Secretary of Commerce recognized "the constitutional mandate and historical precedent of using the 'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated." *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. at 69372. As he emphasized: "the framers of the Constitution drew a clear distinction between an 'actual Enumeration' and an estimate, regardless of its underlying methods." *Id.*

The House of Representatives advanced the same argument to the Supreme Court in 1998. *See* 1998 House Br., 1998 WL 767637, at *44-50. "When the Framers used the term 'actual Enumeration,'" the House argued, "they anticipated a procedure by which the government would actually 'count' or 'reckon-up' the people, one by one." *Id.* at 46. The House rejected the view that "an 'actual enumeration' means no more than the 'action of ascertaining an official count of the number of persons who exist,' and the 'manner' of ascertaining that official count is entirely up to Congress or its delegate." *Id.*

It also bears emphasizing why the Framers were insistent on an "actual Enumeration." Besides selecting a method that was simple and unambiguous, they sought to guard against political "manipulation" of the census and the resulting apportionment. Brief. of National Republican Legislators Ass'n as Amici Curiae, No. 98-404, *Dep't of Commerce v. House of Representatives* ("Republican Legislators Br."), 1998 WL 767644, at *6 (U.S. filed Nov. 3, 1998). To that end, the Framers required a census every ten years, rather than whenever Congress might deem fit, because "those who have power in their hands will not give it up while they can retain it." 1 Records of the Federal Convention of 1787 at 578 (Max Farrand ed., 1911). Likewise, the Framers placed the entire census process in the hands of the national legislature, since the States were "too much interested to take an impartial [count] for themselves." *Id.* at 580.

The Framers adopted the "actual enumeration" requirement in that same spirit. *See* 1998 House Br., 1998 WL 767637, at *48; Republican Legislators Br., 1998 WL 767644, at *8. A literal headcount constituted a "permanent and precise standard" that would "t[ie] the hands" of future Congresses so that they "could not sacrifice their trust to momentary considerations." 1 Records of the Federal Convention of 1787 at 578, 580 (Max Farrand ed., 1911). This method also "had the recommendation of great simplicity and uniformity in its operation, of being gener-

ally acceptable to the people, and of being less open to fraud and evasion, than any other, which could be devised." 2 Joseph Story, Commentaries on the Constitution of the United States § 633 (1833); see also 3 Joseph Story, Commentaries on the Constitution of the United States § 676, at 143 (1833) ("[T]he rule" established by the Enumeration Clause was intended "always [to] work the same way …, and be as little open to cavil, or controversy, or abuse, as possible.").

2. *"Actual Enumeration" of the Number of Undocumented Immigrants in Connection with the 2020 Census is Not Possible*

Having set forth what the Enumeration Clause requires and why the Framers required it, it is clear that any attempt to implement the Memorandum in connection with the 2020 census would violate that clause's mandate.

The Census Bureau did not inquire about respondents' compliance with immigration laws (*i.e.*, their documented/undocumented status) in connection with the 2020 census. Stat. ¶ 52. By Defendants' admission, it is far too late to add such a question to the census now. Stat. ¶ 53. Nor, as Plaintiffs' experts explain, is there any other available source of data that would constitute an "actual Enumeration" of all 50 states' undocumented immigrant populations—*i.e.*, a person-by-person "reckoning" of who is an undocumented immigrant and who is not, produced through a direct inquiry of each household in the country. Stat. ¶¶ 69, 77, 81, 87, 109.

Therefore, at the conclusion of the census, the Bureau will lack anything constituting an "actual Enumeration" of who in each State is an undocumented immigrant. Stat. ¶¶ 69, 81, 87, 108. Any estimate of the undocumented immigrant population that the Bureau might be able to make with the partial administrative records that it is attempting to piece together will be just that: an estimate, not an "actual Enumeration." Stat. ¶¶ 80-102. And once that estimate is subtracted from the "whole number of persons in each state," as determined by the Bureau through the census, the resulting difference—which the President intends to use as the apportionment

base—will also be an estimate, not an "actual Enumeration." *See* Athel Cornish-Bowden, *Basic Mathematics for Biochemists* 18 (1981) ("[J]ust as a chain is no stronger than its weakest link, the result of a calculation … is no more accurate than the most inaccurate value used in it.").

B. Implementing the Memorandum Would Violate the Statutory Ban on Statistical Sampling

1. *13 U.S.C. § 195 Prohibits Statistical Sampling in Connection with Determining the Apportionment Base*

As discussed above, starting with the very first Congress, all Census Acts have "require[d] enumerators to 'visit [or otherwise contact] personally each dwelling house …' in order to obtain 'every item of information and all particulars required'" for the census process. *House of Representatives*, 525 U.S. at 335 (quoting Act of Aug. 31, 1954, § 25(c), 68 Stat. 1012, 1015). These acts, therefore, implicitly "prohibited the use of statistical sampling in calculating the population for purposes of apportionment." *Id.*

In 1957, however, Congress made that prohibition explicit. The Secretary of Commerce asked Congress to amend the Census Act "to permit the [Census] Bureau to use statistical sampling" to gather certain "supplemental, nonapportionment census information regarding population, unemployment, housing, and other matters collected in conjunction with the decennial census." *Id.* at 336-37. In response, Congress enacted 13 U.S.C. § 195, which gives the Secretary the limited authority to employ "the statistical method known as 'sampling'"—"[e]xcept for the determination of population for apportionment purposes." As the Supreme Court has held, "[13 U.S.C.] § 195 ***directly prohibits the use of sampling*** in the determination of population for purposes of apportionment"—whether "as a 'supplement' [to] or as a 'substitute'" for actual enumeration. 525 U.S. at 338, 342 (emphasis added).

In 1997, Congress reiterated its view that 13 U.S.C. § 195 prohibits the use of "statistical sampling or adjustment in conjunction with an actual enumeration." 1998 Appropriations Act,

§ 209(a)(7), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note). It further clarified that this includes "the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add ***or subtract*** counts to or from the enumeration of the population as a result of statistical inference." *Id.* § 209(h)(1) (emphasis added).

The reason why Congress prohibited statistical sampling in apportionment is the same reason why the Framers insisted on an "actual enumeration": the danger that "the census could become just a tool to further the political ends of [the methodology's] designers, the political party that controls the executive branch." Republican Legislators Br., 1998 WL 767644, at *8. President George H. W. Bush's Secretary of Commerce, Robert Mosbacher, explained that sampling would "open the door to political tampering with the census" and "subject the Census Bureau to partisan pressures," because such methods "depend[] heavily on assumptions," and their results change "in important ways" when those assumptions change. Dep't of Commerce, *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing, Notice of Final Decision*, 56 Fed. Reg. 33582, 33583, 33605 (July 22, 1991); *see also Wisconsin v. City of New York*, 517 U.S. 1, 11-12 (1996) (summarizing these concerns).

In short, as Congress put it in 1997: the use of sampling techniques "to carry out the census with respect to any segment of the population poses the risk of ***an inaccurate, invalid, and unconstitutional census***." 1998 Appropriations Act, § 209(a)(7), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note) (emphasis added).

2. *Any Method of Implementing the Memorandum Available to the Census Bureau Would Require Statistical Sampling*

In addition to violating the Enumeration Clause, any process that Defendants might use to implement the Memorandum would violate 13 U.S.C. § 195, because "[w]ithout an actual enu-

meration, there is no known method of excluding undocumented immigrants" from the apportionment count "that does not rely on statistical sampling." Stat. ¶ 80.

Absent an "actual Enumeration" of every undocumented immigrant in every state, the Census Bureau has just two ways to implement the Memorandum. The first is to use existing estimates of the undocumented immigrant population created by third parties, such as the Pew Research Center, the Center for Migration Studies, and other think-tanks. Stat. ¶¶ 57, 69. These estimates are useful for many purposes, including predicting the results of the upcoming census, but they do not provide the level of certainty and definiteness that the Constitution and federal statutes require for the actual task of apportionment. Instead, they all rely on statistical sampling, which necessarily yields accompanying bands of uncertainty. They cannot be used for purposes of apportionment under 13 U.S.C. § 195. Stat. ¶¶ 57, 72-79.

The only other option available to the Census Bureau is to use whatever administrative records it has been able to piece together to attempt to quantify the undocumented population. Stat. ¶¶ 69, 80-87. This option, too, would require significant statistical sampling and adjustment. Stat. ¶¶ 80, 90-102. Unsurprisingly, there are very few administrative records that directly document those whose status is undocumented. Stat. ¶ 88. The records that do exist "represent a tiny fraction of those in the country without formal legal immigration status." Stat. ¶ 88. Moreover, those records are riddled with errors and inconsistences and are out of date. Stat. ¶ 89. Thus, any attempt to project this data to the present day and extrapolate it to a count of the entire undocumented population "would require extensive statistical modeling." Stat. ¶ 90.

3. *The Adjustment Required Would Not Constitute Lawful "Imputation"*

In *Utah v. Evans*, 536 U.S. 452, the Supreme Court recognized that one specific type of adjustment to the census totals, known as "imputation," does not violate § 195's ban on sampling. Occasionally, even after repeated follow-up attempts, the Census Bureau will be unable to

identify "whether [an address] represents a housing unit," or "the number of persons an occupied unit contains." *Id.* at 457-58. In such circumstances, the Bureau may lawfully "impute" that missing information, based on observations about similar nearby addresses. *Id.* As the Court explained, several things differentiate this lawful process of imputation from unlawful sampling—and none of those indicia of lawful imputation are present here. Stat. ¶¶ 83-86, 91-102.

First, "the Bureau turns to imputation only after ordinary questionnaires and interviews have failed" to enumerate a given residence. 536 U.S. at 470, 477. Here, however, Defendants would not be turning to inferential techniques "only after … exhaust[ing] [their] efforts to reach each individual" and ask them directly about their immigration status. *Id.* at 477. To the contrary, Defendants would be using inferential techniques as a first resort. Stat. ¶¶ 95-100.

Second, imputation is used "sparingly," to fill in gaps involving only "a tiny percent of the [total] population"—such as the 0.4% gap at issue in *Evans*. 536 U.S. at 471, 477, 479 (suggesting that, if the number of missing responses had been as high as 10%, imputation would be improper). Here, by contrast, Defendants would not be using inference "sparingly" to fill in a "tiny" gap in an actual enumeration of Americans by immigration status. To the contrary, Defendants would be inferring immigration status for virtually the entire population—a scale "orders of magnitude larger" than that at issue in *Evans*. Stat. ¶ 101.

Third, the type of "count imputation" at issue in *Evans* is politically neutral and cannot be used "to manipulate results" toward a desired partisan outcome. 536 U.S. at 471-72, 479; *see also Montana*, 503 U.S. at 464 & n.42 (rejecting Enumeration Clause claim where challenged technique was adopted in "good faith," rather than as an attempt to "favor[] a particular party" or "maintain partisan political advantage"). But the process proposed here is anything but neutral. Indeed, reducing the representation of certain known states is the entire reason for its existence.

Fourth, the Court noted that the type of imputation at issue in *Evans*—inferring whether an address is residential and how many people live there using data about neighboring addresses—resembles the long-accepted practice of "ask[ing] … neighbors, landlords, postal workers, or other proxies about the number of inhabitants in a particular place" after direct inquiry had failed. 536 U.S. at 477. "Such reliance on hearsay," the Court concluded, had a long historical pedigree, and "need be no more accurate" than "the Bureau's method of imputation." *Id.* Here, however, the data that Defendants seek to estimate—how many people in each state are "in a lawful immigration status under the Immigration and Nationality Act"—is far different. Neighbors, landlords, postal workers, and other third-party "proxies" generally do not have accurate first-hand knowledge of whether a given individual in their community is in compliance with immigration laws. The use of inferential techniques to divine that data, therefore, would not resemble anything ever done the history of the decennial census. Stat. ¶ 101, 109.

Finally, unlike traditional "imputation" of the number of people living in a given house, any model that Defendants might devise to predict undocumented immigrant status in the absence of direct records will presumably treat Hispanic race or ethnicity, or Latin American national origin, as a key predictive variable. Stat. ¶¶ 101-102. Removing persons from the apportionment base even in part based on their race, ethnicity, or national origin would raise fundamental equal protection concerns not implicated by the type of "imputation" approved in *Evans*. *See Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (noting that race-based government action "remains suspect even if race is meant to function as a proxy for other … characteristics").

* * *

In sum, even if it were not inherently unlawful to exclude undocumented immigrants from the apportionment base, Defendants could not possibly implement the Memorandum in a

lawful manner based on the data available to them. Any estimate that Defendants might make of the number of undocumented immigrants in each state would not meet Article I's requirement of an "actual Enumeration," and it would require the type of statistical sampling and adjustment that 13 U.S.C. § 195 expressly prohibits. These requirements were adopted specifically to prohibit the type of partisan political manipulation in which Defendants are attempting to engage.

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment in Plaintiffs' favor with respect to Counts I, IV, and V of the First Amended Complaint. In the alternative, if the Court determines that any genuine dispute(s) of material fact prevent entry of summary judgment, the Court should order an expedited trial on the merits with respect to such dispute(s).

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