

1 LATHAM & WATKINS LLP
Steven M. Bauer (Bar No. 135067)
2 steven.bauer@lw.com
Sadik Huseny (Bar No. 224659)
3 sadik.huseny@lw.com
Amit Makker (Bar No. 280747)
4 amit.makker@lw.com
Shannon D. Lankenau (Bar. No. 294263)
5 shannon.lankenau@lw.com
6 505 Montgomery Street, Suite 1900
San Francisco, California 94111
Telephone: 415.391.0600
7 Facsimile: 415.395.8095

8 LATHAM & WATKINS LLP
Richard P. Bress (*pro hac vice* pending)
9 rick.bress@lw.com
10 555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
11 Facsimile: 202.637.2201

12 *Attorneys for Plaintiffs City of San Jose,*
California; King County, Washington;
13 *Arlington County, Virginia; Black Alliance for*
Just Immigration; Sam Liccardo; Zerihoun
14 *Yilma; and Lovette Kargbo-Thompson*

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
Kristen Clarke (*pro hac vice* pending)
kclarke@lawyerscommittee.org
Jon M. Greenbaum (Bar No. 166733)
jgreenbaum@lawyerscommittee.org
Ezra D. Rosenberg (*pro hac vice* pending)
erosenberg@lawyerscommittee.org
Dorian L. Spence (*pro hac vice* pending)
dspence@lawyerscommittee.org
Maryum Jordan (Bar No. 325447)
mjordan@lawyerscommittee.org
Ajay Saini (*pro hac vice* pending)
asaini@lawyerscommittee.org
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

PUBLIC COUNSEL
Mark Rosenbaum (Bar No. 59940)
mrosenbaum@publiccounsel.org
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089
[Representation information listed below]

15
16 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CITY OF SAN JOSE, CALIFORNIA; KING
19 COUNTY, WASHINGTON; ARLINGTON
COUNTY, VIRGINIA; BLACK ALLIANCE FOR
20 JUST IMMIGRATION, a California nonprofit
corporation; Sam Liccardo; Zerihoun Yilma; and
21 Lovette Kargbo-Thompson,

Plaintiffs,

22 vs.

23 DONALD J. TRUMP, in his official capacity as
President of the United States; WILBUR L.
24 ROSS, JR., in his official capacity as
Secretary of Commerce; U.S. DEPARTMENT OF
25 COMMERCE, U.S. CENSUS BUREAU, STEVEN
DILLINGHAM, in his official capacity as Director of
26 the U.S. Census Bureau, and CHERYL L.
JOHNSON, in her official capacity as Clerk of the
27 U.S. House of Representatives,

28 Defendants.

CASE NO.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. On July 21, 2020, President Donald J. Trump issued a Presidential Order titled
3 “Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020
4 Census” (the “Apportionment Exclusion Order”). The Apportionment Exclusion Order states
5 that, for the first time in this country’s history, undocumented immigrants no longer count as
6 “persons” under the Constitution. In spite of the Constitution’s words, in spite of statutory
7 command, and in spite of the unbroken practice of every administration since 1790, the President
8 will “exclude from the apportionment base aliens who are not in a lawful immigration status.”
9 He has ordered the Secretary of Commerce to provide him with 2020 decennial census
10 information “to carry out” his objective. 85 Fed. Reg. 44679 (July 23, 2020) (Attachment 1).
11 The President’s stated justification for reversing our country’s democratic tradition is his
12 personal view of a nation “more consonant with the principles of representative democracy.”

13 2. The Apportionment Exclusion Order is illegal. It violates the Constitution and the
14 Census Act, and it discriminates against people based on race, ethnicity, and national origin in
15 violation of the Due Process and Equal Protection Clauses. By this Complaint, Plaintiffs seek
16 declaratory and injunctive relief invalidating the Order and ensuring that it does not taint or
17 subvert the ongoing 2020 Census or the apportionment process.

18 3. The Apportionment Exclusion Order violates the plain text of the Constitution,
19 which consistently considers a person to be a person. The Constitution’s Apportionment Clause,
20 as amended by the Fourteenth Amendment, states that Representatives “shall be apportioned
21 among the several States . . . according to their respective Numbers,” U.S. Const. art. I, § 2, cl. 3;
22 *id.* amend. XIV, § 2, which requires “counting the whole number of persons in each State,” U.S.
23 Const. amend. XIV, § 2. When the drafters meant to exclude certain classes of persons, they said
24 so expressly, e.g., “excluding Indians not taxed.” *Id.* No provision excludes undocumented
25 immigrants residing in the United States. Furthermore, regardless of their immigration status,
26 they have never before been deemed *non*-persons under the Constitution. *See, e.g., Plyler v.*
27 *Doe*, 457 U.S. 202, 210 (1982) (“Whatever his status under the immigration laws, an alien is
28 surely a ‘person’ in any ordinary sense of that term.”).

1 4. The Apportionment Exclusion Order also violates the plain text of the Census
2 Act. 13 U.S.C. § 141; *see also* 2 U.S.C. § 2a(a). The Census Act directs the Secretary of
3 Commerce to administer the census and to report to the President “the tabulation of total
4 population by States . . . as required for the apportionment of Representatives in Congress among
5 the several States.” 13 U.S.C. § 141(b). The President is then required to transmit to Congress
6 “a statement showing the whole number of persons in each State, excluding Indians not taxed, as
7 ascertained under the . . . decennial census of the population, and the number of Representatives
8 to which each State would be entitled under an apportionment of the then existing number of
9 Representatives by the method known as the method of equal proportions.” 2 U.S.C. § 2a(a).
10 The Order violates the Act by directing the Secretary (and by extension the Department of
11 Commerce and its officials), in the decennial census report, to transmit information that does not
12 actually include the correct population for apportionment, so that the President can exercise his
13 purported “discretion” to miscount persons.

14 5. By excluding undocumented immigrants from the definition of persons for
15 apportionment purposes, the Apportionment Exclusion Order abandons over two hundred years
16 of consensus among all three branches of government, through Republican and Democratic
17 administrations alike. Since the Nation’s founding, every administration has understood that
18 requirement to mean what it says: “person” means “person.” And every administration that has
19 addressed the issue, including those of Ronald Reagan and George H.W. Bush, has rejected any
20 claim that undocumented immigrants are not among the “whole number of persons in each
21 State.” U.S. Const. amend. XIV, § 2. But under this Apportionment Exclusion Order, all
22 “persons” somehow becomes “all persons *except* those the sitting president in any given census
23 year may deem unworthy of inclusion.” No President has ever been granted, and no President
24 has, unfettered discretion to rewrite the Constitution and 200 years of history through such
25 personal fiat.

26 6. One year ago, the United States Supreme Court held that the Secretary of
27 Commerce’s claimed justification for inserting a question about citizenship in the census was “a
28 distraction” and “contrived.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

1 Here, once again, the stated reason for defining undocumented immigrants as non-persons is
 2 contrived. The Order itself reveals that the President's intent is to reapportion congressional
 3 seats away from disfavored States such as California and to dilute the congressional
 4 representation of ethnic and racial minorities. That plan follows a consistent history of actions
 5 and statements by the President and his advisors showing that the Apportionment Exclusion
 6 Order is motivated by an intent to discriminate against these ethnic and racial minorities.

7 7. The Apportionment Exclusion Order advances an unprecedented effort to alter the
 8 basis of our representative democracy, heedless of the plain constitutional and statutory text,
 9 precedent, and unbroken historical practice. Plaintiffs seek declarative and injunctive relief to
 10 ensure that it does not succeed.

11 JURISDICTION AND VENUE

12 8. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346(a), and
 13 1361.

14 9. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1).
 15 Defendants are United States officers or agencies sued in their official capacities, a substantial
 16 part of the events or omissions giving rise to this action have occurred or will occur in this
 17 district, and one or more Plaintiffs reside in this district.

18 10. This Court may grant declaratory and injunctive relief under 28 U.S.C. §§ 2201
 19 and 2202.

20 11. The proper intradistrict assignment for this action is the San Jose Division, in light
 21 of the location of Plaintiffs City of San Jose, Santa Clara County, and the Mayor of San Jose,
 22 Sam Liccardo.

23 PARTIES

24 **A. Plaintiffs**

25 12. Plaintiff City of San Jose is a municipal corporation in the County of Santa Clara,
 26 California. It is the tenth-largest city in the United States, with an estimated population of
 27 1,927,852. Since its founding, San Jose has always been a home to immigrant communities.
 28 Today, nearly 40% of its population was born in another country, and nearly one-third of its

1 population is of Hispanic, Latino, Black, or African American origin. San Jose is part of
2 California’s 17th congressional district. It brings this action on its own behalf as a municipal
3 corporation.

4 13. Plaintiff King County is a municipal corporation organized as a home rule charter
5 county and political subdivision under the laws of the State of Washington. It is the most
6 populous county in Washington, encompassing the cities of Seattle, Bellevue, Kent, Redmond,
7 among others. In 2019, the Census Bureau estimated that King County’s population was
8 2,252,782. Approximately 21 percent of its population is made up of immigrants, a
9 large majority of whom come from Asia, Latin America, and Africa. King County is represented
10 in Washington’s 1st, 7th, 8th, and 9th congressional districts. It brings this action on its own
11 behalf as a municipal corporation.

12 14. Plaintiff Arlington County is a political subdivision of the Commonwealth of
13 Virginia. The 2010 Census reported that Arlington County had a population of 207,627. In
14 2019, the Census Bureau estimated that Arlington’s population was 236,842. Approximately 23
15 percent of Arlington County’s population is made up of immigrants, most of whom are Hispanic.
16 Arlington County is part of Virginia’s 8th congressional district. It brings this action on its own
17 behalf as a political subdivision of the Commonwealth of Virginia.

18 15. Plaintiff Black Alliance for Just Immigration (“BAJI”) is a nonprofit organization
19 organized and existing under the laws of California, with offices in California, Florida, Georgia,
20 and New York. BAJI collaborates with African Americans and Black immigrants to organize
21 and advocate for equal and just laws in their communities. BAJI campaigns to advance racial
22 justice and provides partner organizations with varied assistance—particularly on immigration
23 policy—and it spends significant resources educating its partner organizations, individuals, and
24 other constituents through presentations, workshops, publications, technical assistance, and
25 trainings. BAJI is a membership organization, and its members either pay dues or volunteer their
26 time to support the organization. Members also actively participate in BAJI’s self-governance
27 and decision-making at the local level.

28

1 16. Plaintiff Sam Liccardo is the Mayor of the City of San Jose. He is a resident and
2 citizen of Santa Clara County, California, where he is registered to vote and regularly exercises
3 his right to vote.

4 17. Plaintiff Zerihoun Yilma is the Board Chair of BAJI. He is a resident and citizen
5 of Los Angeles County, California, where he is registered to vote and regularly exercises his
6 right to vote.

7 18. Plaintiff Lovette Kargbo-Thompson is an Organizer and Member of BAJI. She is
8 a resident and citizen of Lawrenceville, Georgia, where she is registered to vote and regularly
9 exercises her right to vote.

10 **B. Defendants**

11 19. Defendant Donald J. Trump is the President of the United States and is sued in his
12 official capacity.

13 20. President Trump issued the Apportionment Exclusion Order that determined that
14 undocumented immigrants will not be counted in the apportionment for the House of
15 Representatives, contrary to the Constitution and 2 U.S.C. § 2a(a). The Apportionment
16 Exclusion Order directs the Secretary of Commerce to aid the President in carrying out this
17 determination. It orders the Secretary (and by extension, the Department of Commerce and the
18 Census Bureau/Census Bureau officials who are within the Department of Commerce), in
19 preparing the decennial census report, to provide the President with information that does *not*
20 include the correct population for apportionment, thus tainting and subverting the census and
21 apportionment process. Declaratory relief against the President is needed to prevent the
22 unconstitutional and unlawful conduct directed by the Order.

23 21. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce
24 and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce,
25 the Census Bureau, the decennial census, and the census tabulations reported to the President.

26 22. Defendant U.S. Department of Commerce is a cabinet agency within the
27 Executive Branch responsible for administering the decennial census and transmitting its
28 tabulations to the President.

1 23. Defendant Census Bureau is an agency within the Department of Commerce
2 responsible for planning and administering the decennial census.

3 24. Defendant Steven Dillingham is the Director of the Census Bureau and is sued in
4 his official capacity.

5 25. The Apportionment Exclusion Order directs Secretary Ross to take “all
6 appropriate action” to provide the President with information permitting the President to take
7 unconstitutional and unlawful actions as alleged herein.

8 26. As an agency within the Department of Commerce, the Census Bureau is under
9 Secretary Ross’s supervision, but is directly headed by Director Dillingham.

10 27. The Apportionment Exclusion Order requires Secretary Ross, the Department of
11 Commerce, the Census Bureau, and Director Dillingham to provide the President with a census
12 decennial report that excludes undocumented immigrants from the apportionment calculation.
13 There is no reason to believe that these Defendants have refused to comply with the Order or
14 subsequent directives related to the Order. Relief against Secretary Ross, the Department of
15 Commerce, the Census Bureau, and Director Dillingham is necessary to ensure that the
16 apportionment process is conducted lawfully.

17 28. Defendant Cheryl L. Johnson is the Clerk of the United States House of
18 Representatives and is responsible for “send[ing] to the executive of each State a certificate of
19 the number of Representatives to which such State is entitled” following a decennial
20 reapportionment. 2 U.S.C. § 2a(b). She is sued in her official capacity.

21 29. As the transmitter of the certificate of the number of Representatives to each State
22 under 2 U.S.C. § 2a(b), Clerk Johnson (or her successor) is the last link in the President’s
23 unconstitutional and unlawful actions as alleged herein. Relief against Clerk Johnson is needed
24 to remedy the unconstitutional and unlawful conduct flowing from the Apportionment Exclusion
25 Order, and to ensure that any non-compliant statement submitted by the President to the Clerk is
26 appropriately handled and not allowed to subvert the apportionment process.

27
28

ALLEGATIONS

A. The Constitution Requires Apportioning Members of the House of Representatives Based on the Total Number of Persons Residing in Each State

30. A plain text reading of the Constitution provides a sufficient basis to resolve this matter in favor of plaintiffs. Article I, Section 2, Clause 3 (the “Apportionment Clause”) expressly addresses the apportionment of Representatives:

Representatives . . . 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. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

U.S. Const. art. I, § 2, cl. 3 (emphasis added).

31. The Fourteenth Amendment, enacted in the wake of the Civil War, eliminated the Apportionment Clause’s three-fifths component and provided that Representatives must be apportioned based on “the whole number of *persons* in each State, excluding Indians not taxed.”

U.S. Const. amend. XIV, § 2 (emphasis added).

32. The Constitution “was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (citation omitted). And when that ordinary meaning is clear, “there is no room for construction and no excuse for interpolation or addition.” *United States v. Sprague*, 282 U.S. 716, 731 (1931). Here, the meaning of constitutional provisions specifying “persons” is unambiguous and thus controlling.

33. The ordinary meaning of “person” remains the same today as it was when the Constitution and the Fourteenth Amendment were ratified. “Person” means a human being. *See, e.g., Person*, Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (“A general loose term for a human being; one; a man.”); *Person*, Noah Webster, *American Dictionary of the English Language* (1865) (“[A] living human being; a man, woman, or child; an individual of the

1 human race.”); *Person*, Merriam-Webster Online Dictionary (“1. Human, Individual”),
2 <https://www.merriam-webster.com/dictionary/person> (last visited July 27,
3 2020)[<https://perma.cc/S58J-7F97>]. That ordinary meaning of person does not exclude persons
4 who are undocumented immigrants.

5 34. The broader text of the Constitution also makes clear that the Framers knew that
6 the word “person” is broad and encompasses all human beings. When the Framers sought to
7 exclude certain *classes* of persons, they did so expressly: They excluded “Indians not taxed,”
8 and they discounted the value for enumeration purposes of persons who were not “free”—*i.e.*,
9 slaves—by forty percent. U.S. Const. art. I, § 2, cl. 3. The drafters of the Fourteenth
10 Amendment, in turn, retained the exclusion of “Indians not taxed,” but abolished the three-fifths
11 clause. *See* U.S. Const. amend. XIV, § 2. Under basic interpretative principles, the drafters’
12 choice to “explicitly enumerate[] certain exceptions” to the general rule that all persons are to be
13 included means that “additional exceptions are not to be implied, in the absence of evidence of a
14 contrary . . . intent.” *Class v. United States*, 138 S. Ct. 798, 808 (2018) (quoting *Andrus v.*
15 *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). *Cf. Pine Grove Tp. v. Talcott*, 86 U.S. 666,
16 674-75 (1873) (applying to the Constitution the canon that when one or more things of a class
17 are expressly mentioned, others of the same class are excluded).

18 35. The all-inclusive meaning of “persons” in the Apportionment Clause and Section
19 2 of the Fourteenth Amendment is confirmed further by binding precedent interpreting the
20 meaning of the same word used elsewhere in the Constitution and, specifically, the Fourteenth
21 Amendment. “When seeking to discern the meaning of a word in the Constitution, there is no
22 better dictionary than the rest of the Constitution itself.” *Ariz. State Legislature v. Ariz. Indep.*
23 *Redistricting Comm’n*, 135 S. Ct. 2652, 2680 (2015) (Roberts, C.J., dissenting) (collecting
24 cases); *see also Hurtado v. California*, 110 U.S. 516, 534-35 (1884) (“due process” had the same
25 meaning in the Fourteenth and Fifth Amendments because “the same phrase was employed”);
26 *Martin v. Hunter’s Lessee*, 14 U.S. 304, 329, 1 Wheat. 304, 329 (1816) (examining the use of
27 the phrase “shall be vested” in locations across the Constitution to determine its consistent
28 meaning).

1 36. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court held that the
2 “persons” protected by Section 1 of the Fourteenth Amendment and the Fifth Amendment’s Due
3 Process Clause include everyone in the United States: “The fourteenth amendment to the
4 constitution is not confined to the protection of citizens. . . . [Its due process and equal
5 protection] provisions are universal in their application, to all persons within the territorial
6 jurisdiction, without regard to any differences of race, of color, or of nationality.” *Id.* at 369.
7 The Court reiterated this principle in *Zadvydas v. Davis*, 533 U.S. 678 (2001), stating that
8 “persons” under the Due Process Clause includes everyone “within the United States, including
9 aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693
10 (collecting cases). There is a strong presumption that the word carries the same comprehensive
11 meaning in the Apportionment Clause and Section 2 of the Fourteenth Amendment.

12 37. The Framers of the Constitution reflected their understanding of the breadth of the
13 term “persons” in another provision too. *See* U.S. Const. art. I, § 9, cl. 1 (using “persons” to
14 refer to slaves who could be “[i]mport[ed]” into the United States until 1808). And, when the
15 drafters of the Fourteenth Amendment intended to describe a narrower class than *all* persons,
16 they chose a narrower term. Section 1, for instance, differentiates between “persons” in the
17 Citizenship, Equal Protection, and Due Process Clauses, and “citizens” in the Privileges and
18 Immunities Clause. U.S. Const. amend. XIV, § 1. Section 2 likewise differentiates between
19 “persons” and “citizens.” The first sentence requires “counting the whole number of persons in
20 each State, excluding Indians not taxed.” U.S. Const. amend. XIV, § 2. By contrast, the second
21 sentence is limited to “citizens”: “But when the right to vote at any election . . . is denied to any
22 of the male inhabitants of such State, being twenty-one years of age, and citizens of the United
23 States, . . . the basis of representation therein shall be reduced in the proportion which the
24 number of such male citizens shall bear to the whole number of male citizens twenty-one years
25 of age in such State.” *Id.* The use of these two different words in Section 2 is not accidental. To
26 the contrary, “[f]rom [a] difference of phraseology, . . . a difference of constitutional intention
27 may, with propriety, be inferred. It is hardly to be presumed that the variation in the language
28

1 could have been accidental. It must have been the result of some determinate reason.” *Martin*,
2 14 U.S. at 334 (Story, J.).

3 38. The Framers would have been aware that choosing the word “persons” would
4 include at least women, children, bound servants—and aliens, since the same article of the
5 Constitution grants Congress the power “to establish an uniform Rule of Naturalization.” U.S.
6 Const. art. 1, § 8, cl. 4; *see also Garza v. Cty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990)
7 (“The framers were aware that this apportionment and representation base would include
8 categories of persons who were ineligible to vote—women, children, bound servants, convicts,
9 the insane, and, at a later time, aliens.”). And ultimately the Framers adopted without comment
10 or debate the term “persons” in place of the phrase “free citizens and inhabitants” as the basis for
11 apportionment in the House. *See 2 Records of the Federal Convention of 1787*, pp. 571, 590-91
12 (M. Farrand ed. 1911).

13 39. Interpreting “person” according to its ordinary, inclusive meaning is also the
14 reading most consistent with the Framers’ theory of representative democracy. In the *Federalist*
15 *Papers*, James Madison explained that it “is a fundamental principle of the proposed constitution
16 that as the aggregate number of representatives allotted to the several states, is to be . . . founded
17 on the aggregate number of inhabitants; so, the right of choosing this allotted number in each
18 state, is to be exercised by such part of the inhabitants, as the state itself may designate.” *The*
19 *Federalist* No. 54, p. 284 (James Madison) (G. Carey & J. McClellan eds. 2001). This means
20 that “the basis of *representation* in the House was to include all inhabitants—although slaves
21 were counted as only three-fifths of a person—even though States remained free to deny many of
22 those inhabitants the right to participate in the selection of their representatives.” *Evenwel v.*
23 *Abbott*, 136 S. Ct. 1120, 1127 (2016). “Endorsing apportionment based on total population,
24 Alexander Hamilton declared: ‘There can be no truer principle than this—that every individual
25 of the community at large has an equal right to the protection of government.’” *Id.* (citing 1
26 *Records of the Federal Convention of 1787*, p. 473 (M. Farrand ed. 1911)).

27 40. The drafting history of the Fourteenth Amendment likewise confirms that the
28 word “persons” does not exclude undocumented immigrants. The 39th Congress, which enacted

1 the Fourteenth Amendment, began its first session on December 4, 1865, shortly after the Civil
2 War (and two days before ratification of the Thirteenth Amendment). Cong. Globe, 39th Cong.,
3 1st Sess. 1, 3 (Dec. 4, 1865). Because recently freed slaves had become “free Persons” and not
4 “other Persons” under the Enumeration Clause, they had greater weight in apportionment, and
5 Southern representation in Congress was expected to increase significantly. See William W. Van
6 Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-*
7 *Ninth Congress*, 1965 Sup. Ct. Rev. 33, 46 [“Van Alstyne, *The Fourteenth Amendment*”];
8 Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth*
9 *Amendment to Determine The Amendment’s Original Meaning*, 4 Conn. L. Rev. 1069, 1089-90
10 (2017); *Oregon v. Mitchell*, 400 U.S. 112, 157 (1970) (Harlan, J., concurring in part and
11 dissenting in part).

12 41. The 39th Congress actively debated several different methods for calculating
13 apportionment, including whether to base apportionment on the population of voters, citizens, or
14 all persons residing in a State. See generally Van Alstyne, *The Fourteenth Amendment*, 1965
15 Sup. Ct. Rev. at 45-48; *Fed’n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp.
16 564, 576 (D.D.C. 1980). At the time of the debate, non-citizens were counted in determining
17 representation in Congress. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 353 (Jan. 22, 1866)
18 (statement of Rep. Rogers) (“Every man in this House knows perfectly well in the several States
19 a person under the age of twenty-one years cannot vote, citizens cannot vote, and the whole class
20 of females, constituting nearly one half of the population of this country, cannot vote; yet for
21 these persons the States are entitled to representation.”).

22 42. Some in Congress advocated apportionment based on the number of voters
23 instead of the number of persons, for two reasons: to deal with the changing composition of
24 Congress that would occur were the then-current population-based apportionment to continue,
25 and to encourage expansion of the franchise to the freed slaves. See Van Alstyne, *The*
26 *Fourteenth Amendment*, 1965 Sup. Ct. Rev. at 46-47. But the voter-based apportionment
27 proposal was met with the objection that “population is the true basis of representation,” Cong.
28 Globe, 39th Cong., 1st Sess. 141 (Jan. 8, 1866) (statement of Rep. Blaine), and practical

1 concerns about States with roughly the same population but vastly different number of voters.

2 *Id.*

3 43. Both houses of the 39th Congress extensively discussed continued inclusion of
4 non-citizens in apportionment in the debate over whether it would be equitable to stop using
5 population as the basis for apportionment. *See, e.g., id.* at 359 (Jan. 22, 1866) (statement of Rep.
6 Conkling) (“Many of the large States now hold their representation in part by reason of their
7 aliens, and the Legislatures and people of these States are to pass upon the amendment. It must
8 be acceptable to them.”).

9 44. This drafting history demonstrates that congressional supporters and opponents of
10 population-based apportionment knew that the outcome of the debate would affect the counting
11 of non-citizens. And ultimately both the Senate and the House roundly rejected the proposal to
12 base representation on the voting population rather than the total population. *See Cong. Globe,*
13 *39th Cong., 1st Sess. 2991* (June 6, 1866) (proposal defeated 31-7 in the Senate); *id.* at 535, 538
14 (Jan. 31, 1866) (proposal defeated 131-29 in the House). Instead, the 39th Congress retained the
15 Constitution’s principle of apportioning Representatives based on total population.

16 **B. Uniform Historical Practice Confirms That The Constitution Means**
17 **What It Says**

18 45. Unbroken constitutional practice confirms what the constitutional text and
19 drafting history make plain: the apportionment must be based on the enumeration of *all* persons
20 residing in each State, regardless of legal status.

21 46. When interpreting the Constitution, courts consistently turn to historical practice
22 for guidance. *See, e.g., Evenwel*, 136 S. Ct. at 1132 (“What constitutional history and our prior
23 decisions strongly suggest, settled practice confirms.”); *see generally* William Baude,
24 *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1 (2019). And that historical sword cuts both
25 ways—it can condone or condemn. For instance, in *NLRB v. Noel Canning*, the Court upheld the
26 constitutionality of certain types of recess appointments based in large part on the “longstanding
27 ‘practice of the government.’” 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 4
28 *Wheat.* 316, 401 (1819)). This year, by contrast, the Supreme Court invalidated the structure of

1 an independent agency, noting that sometimes “the most telling indication of [a] severe
2 constitutional problem . . . is a lack of historical precedent to support it.” *Seila Law LLC v.*
3 *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (internal quotation marks omitted).

4 47. Historical practice has played a particularly salient role in cases involving the
5 census, like this one. Just last year the Supreme Court noted in a census case that its
6 “interpretation of the Constitution is guided by a Government practice that has been open,
7 widespread, and unchallenged since the early days of the Republic.” *Dep’t of Commerce v. New*
8 *York*, 139 S. Ct. at 2567 (citation omitted). That same theme is recurrent in the Supreme Court’s
9 other cases addressing the census. *See, e.g., Wisconsin v. City of New York*, 517 U.S. 1, 21
10 (1996) (emphasizing “the importance of historical practice in” understanding the Enumeration
11 Clause); *Franklin*, 505 U.S. at 806 (examining the history of the administration of the census to
12 determine whether the Secretary had violated the Enumeration Clause); *United States Dep’t of*
13 *Commerce v. Montana*, 503 U.S. 442, 465 (1992) (examining the historical practice of
14 apportionment under Article I, Section 2 to inform its meaning).

15 48. Here, the exclusion of undocumented persons from the census’s apportionment
16 base would contradict over two centuries of consistent practice. From the very first census, the
17 population base for purposes of apportionment has always included all persons residing in the
18 United States, including undocumented persons.

19 49. Close historical analogues to undocumented persons demonstrate that the census
20 must count all persons residing in a State, regardless of whether they are residing in that State
21 with the right papers or not. For example, in the 1860 Census—the only one conducted after
22 Congress enacted the Fugitive Slave Act of 1850 (which required free States to cooperate with
23 the capture and return of escaped slaves within their borders, who were deemed to have no
24 lawful presence there, *see* 9 Stat. 462-65 (1850)) but before ratification of the Thirteenth
25 Amendment—the census explicitly counted fugitive slaves in Northern States as part of the “free
26 colored population,” despite their unlawful residence in those States. *See* Bureau of the Census,
27 *Population of The United States in 1860*, at vi-vii, xi, xv-xvi (Gov’t Printing Office 1864)

28

1 (discussing changes in the fugitive slave population from 1850 to 1860),
2 [<https://perma.cc/H5GS-3M8V>].

3 50. Throughout the two-hundred-year history of the United States, the census has
4 always reflected the settled understanding that *all* persons residing in the United States—citizens
5 and non-citizens alike—must be counted to fulfill the Constitution’s “actual Enumeration”
6 mandate. U.S. Const., art. I, § 2, cl. 3; *Klutznick*, 486 F. Supp. at 576; *see also Plyler*, 457 U.S.
7 at 210 (holding that the Equal Protection Clause applies to persons who are in the country
8 without proper authorization because “[w]hatever his status under the immigration laws, an alien
9 is surely a ‘person’ in any ordinary sense of that term”).

10 51. During the first half of the 20th century, a variety of proposals were made in
11 Congress to exclude aliens from the apportionment base, but it was recognized that such a result
12 would require a constitutional amendment. For example, in 1929, the Senate Legislative
13 Counsel concluded that, without a constitutional amendment, “statutory exclusion of aliens from
14 the apportionment base would be unconstitutional.” *Klutznick*, 486 F. Supp. 564, 576-77
15 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980) (citing 71 Cong. Rec. 1821
16 (1929)).

17 52. Again in 1940, Congress considered whether “aliens who are in this country in
18 violation of law have the right to be counted and represented.” *Id.* (quoting 86 Cong. Rec. 4372
19 (1940)). Representative Celler of New York explained:

20 The Constitution says that all persons shall be counted. I cannot
21 quarrel with the founding fathers. They said that all should be
22 counted. We count the convicts who are just as dangerous and just
23 as bad as the Communists or as the Nazis, *as those aliens here*
24 *illegally*, and I would not come here and have the temerity to say
25 that the convicts shall be excluded, if the founding fathers say they
26 shall be included. The only way we can exclude them would be to
27 pass a constitutional amendment.
28

1 *Id.* (quoting 86 Cong. Rec. 4372 (1940)) (emphasis added). On this basis, Congress rejected a
2 proposal to exclude “aliens” from the apportionment base. *See id.*

3 53. More recently, in the 111th Congress, Joint Resolution 11 proposed an
4 amendment to the Constitution to apportion based only on citizenship. *See* H.R.J. Res. 11, 111th
5 Cong. (2009). Other than being referred to committees, no action was taken.

6 54. The Executive Branch, too, has repeatedly recognized—under Presidents of both
7 parties—that the Constitution requires congressional apportionment based on total population,
8 irrespective of citizenship or immigration status.

9 55. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a
10 lawsuit in the District of Columbia seeking to exclude “illegal aliens” from the census and the
11 congressional apportionment base. *Klutznick*, 486 F. Supp. at 565. Opposing the suit, the U.S.
12 Department of Justice (“DOJ”) told the court that the plaintiffs “s[ought] a radical revision of the
13 constitutionally mandated system for allocation of Representatives to the States of the Union and
14 an equally radical revision of the historic mission of the decennial census.” Federal Defs.’ Post-
15 Arg. Mem. at 1, *Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

16 56. “[F]or 200 years,” DOJ told courts, “the decennial census has counted all
17 residents of the states irrespective of their citizenship or immigration status,” and those numbers
18 were used for apportionment. *Id.* Given “the clear and unequivocal language of Section 2 of the
19 Fourteenth Amendment,” DOJ argued that the “radical revision” that the plaintiffs sought could
20 come only from “a constitutional amendment.” *Id.* DOJ also explained that such a revision
21 would be “patently unfair” to residents of communities in which undocumented immigrants live,
22 as undocumented immigrants “demand[] precisely the same level of the services from the
23 municipalities and states in which [they] reside as do all other citizens.” *Id.* at 12.

24 57. In 1988, under President Ronald Reagan, the Director of the Office of
25 Management and Budget sought the views of DOJ on yet another proposal to exclude “illegal
26 aliens” from congressional apportionment base. DOJ concluded that the proposed legislation
27 was “unconstitutional.” Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated
28 June 29, 1988, at 5 (included in 1990 Census Procedures and Demographic Impact on the State

1 of Michigan: Hearing Before the Committee on Post Office and Civil Service, House of
2 Representatives, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States:
3 U.S. Government Printing Office 1988)). In DOJ’s view, it was “clear” that, under the
4 Fourteenth Amendment, “all persons, *including aliens residing in this country*, [must] be
5 included” in the congressional apportionment base. *Id.* at 2 (emphasis added). In fact, DOJ
6 noted, the Reconstruction Congress “rejected arguments that representation should be based on
7 people with permanent ties to the country” and “consciously chose to include aliens.” *Id.* at 2-3.

8 58. In its 1988 opinion, DOJ explained that, for apportionment purposes, the
9 Fourteenth Amendment does not distinguish between “aliens” who are and are not lawfully
10 present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth
11 Amendment, “the Supreme Court . . . has read the word ‘person’ to include illegal aliens.” *Id.* at
12 3-4 (citing *Plyler*, 457 U.S. at 210).

13 59. In 1989, under President George H. W. Bush, DOJ issued a similar opinion. Once
14 again, a Senator had “requested the views of the Department of Justice concerning the
15 constitutionality of proposed legislation excluding illegal or deportable aliens from the decennial
16 census count.” Letter from Carol T. Crawford, Assistant Attorney General, dated Sept. 22, 1989,
17 at 1, 135 Cong. Rec. S12235 (1989). DOJ responded that “section two of the Fourteenth
18 Amendment which provides for ‘counting the whole number of persons in each state’ and the
19 original Apportionment and Census Clauses of Article I section two of the Constitution *require*
20 *that inhabitants of States who are illegal aliens be included* in the census count.” *Id.* (emphasis
21 added). At that time, current Attorney General William Barr was the head of DOJ’s Office of
22 Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ
23 opinion.

24 60. In 2015, under President Barack Obama, DOJ again concluded that Article I, § 2
25 and the Fourteenth Amendment “were purposely drafted to refer to ‘persons,’ rather than to
26 voters, and to include people who could not vote”—specifically including “aliens.” Br. for the
27 United States as *Amicus Curiae*, *Evenwel v. Abbott*, No. 14-940, at 18 (quoting Cong. Globe,
28 39th Cong., 1st Sess. 141, 359), 2015 U.S. S. Ct. Briefs LEXIS 3387. In DOJ’s words, this is

1 because “the federal government act[s] in the name of (and thereby represent[s]) all people,
2 whether they [are] voters or not, and whether they [are] citizens or not.” *Id.* at 19.

3 61. In preparation for the 2020 Census, the Bureau solicited and received two rounds
4 of public comment on the Census Residence Rule and Residence Situations “to allow the public
5 to recommend any changes they would like to be considered for the 2020 Census” with respect
6 to “where people are counted.” Final 2020 Census Residence Criteria and Residence Situations,
7 83 Fed. Reg. 5525, 5526 (2018). As with the residence rules governing prior censuses, the
8 Census Bureau’s 2020 Residence Rule requires that “[c]itizens of foreign countries living in the
9 United States” be “[c]ounted at the U.S. residence where they live and sleep most of the time.”
10 *Id.* at 5533.

11 62. This aligns with the census concept of “usual residence,” which “is grounded in
12 the law providing for the first census, the Act of March 1, 1790, expressly specifying that
13 persons be enumerated at their ‘usual place of abode.’” 83 Fed. Reg. at 5526. The Census
14 Bureau promulgates such criteria as to every decennial census. *See* U.S. Census, 2020 Census
15 Residence Criteria and Residence Situations (Feb. 25, 2020), [https://www.census.gov/programs-](https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html)
16 [surveys/decennial-census/2020-census/about/residence-rule.html](https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html) [[https://perma.cc/5W42-](https://perma.cc/5W42-NCQ7)
17 [NCQ7](https://perma.cc/5W42-NCQ7)].

18 63. Until now, no President of any political party has deviated from the understanding
19 of the Framers and drafters of the Fourteenth Amendment that congressional apportionment must
20 be based on total population, irrespective of citizenship or immigration status. Nor, until now,
21 has any President sought to recalculate the apportionment base by removing any class of persons
22 residing in the United States, regardless of whether they are eligible to vote, are U.S. citizens, or
23 undocumented immigrants.

24 64. The judiciary, too, has consistently shared this understanding. For over fifty
25 years, the Supreme Court has found it “abundantly clear . . . that in allocating Congressmen the
26 number assigned to each state should be determined solely by the number of the State’s
27 inhabitants.” *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). Just four years ago, the Supreme
28 Court stated that the Constitution “select[s] . . . total population as the basis for allocating

1 congressional seats, . . . *whether or not [individuals] qualify as voters.*” *Evenwel*, 136 S. Ct. at
 2 1129 (emphasis added). No court in the United States has ever held otherwise.

3 **C. The Census Act Requires Apportionment Based on the Total Number of**
 4 **Persons Residing in Each State**

5 65. The Enumeration Clause and Fourteenth Amendment empower Congress to enact
 6 legislation governing administration of the census and apportionment. In the Census Act of
 7 1954, Congress delegated to the Secretary of Commerce responsibility for administering the
 8 census, including supervision of the Census Bureau. 13 U.S.C. §§ 1, 2, 4; 68 Stat. 1012 (1954);
 9 90 Stat. 2459 (1976); *see also* 32 Stat. 51 (1902) (creating “Census Office”); 32 Stat. 825 (1903)
 10 (housing “Census Office” within the Department of Commerce and Labor).

11 66. The Census Act mandates that “[t]he Secretary shall, in the year 1980 and every
 12 10 years thereafter, take a decennial census of population as of the first day of April of such
 13 year.” It authorizes the Secretary to conduct the census “in such form and content as he may
 14 determine.” 13 U.S.C. § 141(a). Under the direction of the Secretary and the Bureau Director,
 15 the Bureau conducts the constitutionally required census every ten years by counting all U.S.
 16 residents in the place where they live. The Census Bureau’s rules state that its enumeration
 17 procedures “are guided by the constitutional and statutory mandates to count *all residents* of the
 18 several states,” including “[c]itizens of foreign countries living in the United States.” U.S.
 19 Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United*
 20 *States* at 1-2 (emphasis added), [https://www.census.gov/content/dam/Census/programs-](https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf)
 21 [surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf](https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf) (last accessed July 27,
 22 2020).

23 67. The Census Act also sets forth the procedure and timeline for distribution and use
 24 of the results of the decennial census, instructing the Secretary to submit to the President “[t]he
 25 tabulation of *total population* by States . . . as required for the apportionment of Representatives
 26 in Congress among the several States.” 13 U.S.C. § 141(b) (emphasis added).

27 68. Thereafter, the President must “transmit to the Congress a statement showing the
 28 *whole number of persons in each State* excluding Indians not taxed, *as ascertained under the . . .*

1 *decennial census of the population*, and the number of Representatives to which each State
 2 would be entitled under an apportionment of the then existing number of Representatives by the
 3 method known as the method of equal proportions, no State to receive less than one Member.” 2
 4 U.S.C. § 2a(a) (emphasis added).

5 69. “Each State shall be entitled . . . to the number of Representatives shown in the
 6 [President’s] statement” and “no State to receive less than one Member.” 2 U.S.C. § 2a(b). “It
 7 shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after
 8 the receipt of such statement, to send to the executive of each State a certificate of the number of
 9 Representatives to which such State is entitled under this section.” *Id.*

10 **D. President Trump’s Unlawful Apportionment Exclusion Order**

11 70. Despite the Constitution’s unambiguous command and two centuries of consistent
 12 practice, President Trump, on July 21, 2020, issued the Apportionment Exclusion Order,
 13 excluding undocumented persons from the apportionment base following the 2020 Census and
 14 ordering the Secretary of Commerce to use the census reporting process to facilitate that
 15 exclusion. Contemporaneously, the President issued a statement that he is “directing the
 16 Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020
 17 census.” *See* Statement from the President Regarding Apportionment (July 21, 2020),
 18 <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/>.

19 71. Although the Apportionment Exclusion Order is styled a “Memorandum,” that
 20 label has no legal significance—because the Order’s language and its publication in the Federal
 21 Register confirm that it has binding legal force and effect. *See* 44 U.S.C. § 1505(a) (requiring
 22 executive documents with “general applicability and legal effect” to be published in the Federal
 23 Register); *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85
 24 Fed. Reg. 44679 (July 23, 2020) (“order[ing]” that action be taken). And “there is no substantive
 25 difference in the legal effectiveness of an executive order and a presidential directive that is
 26 styled other than as an executive order.” *Legal Effectiveness of a Presidential Directive, as*
 27 *Compared to an Executive Order*, 24 Op. O.L.C. 29 (2000); *see also Medellin v. Texas*, 552 U.S.

28

1 491, 524 (2008) (analyzing presidential memorandum’s legal effects under *Youngstown* tripartite
2 framework for executive action).

3 72. Section 1 of the Apportionment Exclusion Order provides the purported authority
4 for the President’s action. It states that “Congress has charged the Secretary of Commerce (the
5 Secretary) with directing the conduct of the decennial census in such form and content as the
6 Secretary may determine (13 U.S.C. 141(a)).” Apportionment Exclusion Order § 1. It also
7 states that “[t]he President, by law, makes the final determination regarding the ‘whole number
8 of persons in each State,’ which determines the number of Representatives to be apportioned to
9 each State, and transmits these determinations and accompanying census data to the Congress (2
10 U.S.C. 2a(a)).” *Id.* The Apportionment Exclusion Order then asserts that the President has
11 “discretion to settle the apportionment.” *Id.*

12 73. Section 1 of the Apportionment Exclusion Order observes that the Constitution’s
13 requirement that “persons in each State, excluding Indians not taxed” be enumerated in the
14 census “has been interpreted to mean that only the ‘inhabitants’ of each State should be
15 included.” *Id.* The Order then claims that the President has discretion “to determine who
16 qualifies as an ‘inhabitant.’” *Id.*

17 74. Purportedly in the exercise of that discretion, the Apportionment Exclusion Order
18 announces that the President has “determined that respect for the law and protection of the
19 integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment
20 base,” without regard to whether they reside in the United States. *Id.* § 2. The Apportionment
21 Exclusion Order also sets forth the President’s motivation: he wants to punish States like
22 California and Washington that, he says, have adopted “policies that encourage illegal aliens to
23 enter this country” by diminishing their “representation in the House of Representatives.” *Id.*
24 Indeed, the Order specifically identifies “one State [that] is home to more than 2.2 million illegal
25 aliens, constituting more than 6 percent of the State’s entire population,” and states that “two or
26 three” congressional seats would be allocated in this State than would otherwise be allocated not
27 counting those undocumented persons. On information and belief, that “one State” is California,
28 where Plaintiffs City of San Jose, BAJI, Sam Liccardo, and Zerihoun Yilma are located. *See*

1 Pew Research Center, *U.S. unauthorized immigrant population estimate by state, 2016* (Feb. 5,
2 2019), [https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-](https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/)
3 [state/](https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/).

4 75. To implement the Apportionment Exclusion Order, the President orders the
5 Secretary of Commerce, “[i]n preparing his report to the President under section 141(b) of title
6 13 . . . to provide information permitting the President, to the extent practicable, to exercise the
7 President’s discretion to carry the policy” Apportionment Exclusion Order § 3. In other
8 words, the Secretary is directed to provide information in the census report he is statutorily
9 required to transmit to the President—that will enable the President to unlawfully categorize
10 undocumented immigrants as “non-persons” and thereby exclude them from the apportionment
11 calculation.

12 76. The President’s stated legal justification for this action is that the Constitution’s
13 requirement that “persons in each State, excluding Indians not taxed” be enumerated in the
14 census “has never been understood to include in the apportionment base every individual
15 physically present within a State’s boundaries at the time of the census. Instead, the term
16 ‘persons in each State’ has been interpreted to mean that only the ‘inhabitants’ of each State
17 should be included.” *Id.* § 1. The Apportionment Exclusion Order states that “[d]etermining
18 which persons should be considered ‘inhabitants’ for the purposes of apportionment requires the
19 exercise of judgment,” and it defends excluding undocumented persons as an exercise of that
20 judgment. *Id.*

21 77. That rationale is contrived. Under the Constitution, Representatives are
22 apportioned among the States by “counting the whole number of persons in each State.” U.S.
23 Const. amend. XIV, § 2. Accepting that this means persons who actually reside in the United
24 States, and that tourists are not included for these purposes, millions of undocumented persons in
25 fact reside in California and the United States. They are not just tourists passing through. *See,*
26 *e.g.,* Brian Baker, *Estimates of the Illegal Alien Population Residing in the United States:*
27 *January 2015*, Office of Immigration Statistics, Dep’t of Homeland Security (Dec. 2018),
28 https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf

1 (estimating 12 million undocumented immigrants living in the United States, and estimating 2.9
2 million living in California).

3 78. The Order’s focus on “inhabitants” is misguided. To begin, the Constitution
4 speaks of “persons,” not “inhabitants.” But even if the term used were “inhabitant,” the result
5 would be the same. “Inhabitant” would be co-extensive with the definition of “person” in this
6 context, which means (now, in 1787, and in 1865) persons who reside in a place—without any
7 overlay or additional requirement of legal documentation or status. *See, e.g., Inhabitant*, Samuel
8 Johnson, *A Dictionary of the English Language* (6th ed. 1785) (“Dweller; one that lives or
9 resides [sic] in a place.”); *Inhabitant*, Noah Webster, *American Dictionary of the English*
10 *Language* (1865) (“1. One who dwells or resides permanently in a place, or who has a fixed
11 residence, as distinguished from an occasional lodger or visitor”); *Inhabitant*, Merriam-Webster
12 Online Dictionary (“one that occupies a particular place regularly, routinely, or for a period of
13 time”), <https://www.merriam-webster.com/dictionary/inhabitant> (last visited July 27, 2020).
14 “Inhabitant” is not equivalent with “citizen,” which connotes a fundamentally different
15 relationship with the government, and which lawmakers in 1787, again in 1865, and again now,
16 know very well how to use when they want to limit the scope of persons to the smaller class of
17 citizens of the United States alone. *See, e.g., 2 Records of the Federal Convention of 1787*, pp.
18 182-83 (M. Farrand ed. 1911) (draft of Constitution providing “proportions of direct taxation
19 shall be regulated by the whole number of white and other free citizens and inhabitants, of every
20 age, sex and condition, including those bound to servitude for a term of years, and three fifths of
21 all other persons not comprehended in the foregoing description, (except Indians not paying
22 taxes)”); U.S. Const. art. I, § 2, cl. 2 & § 3, cl. 2 (qualifications to be a Representative or
23 Senator include “be[ing] nine years a Citizen of the United States” as well as “an inhabitant of
24 that State [in or for] which he shall be chosen”); U.S. Const. amend. XIV, § 2 (referring to “male
25 inhabitants of [a] State, being twenty-one years of age, and citizens of the United States”).
26
27
28

1 **E. Harm to Plaintiffs**

2 79. Plaintiffs incorporate by reference the above allegations in this Complaint.

3 80. Millions of undocumented immigrants reside in California and the United States.

4 81. The voting power of Plaintiffs Sam Liccardo, Zerihoun Yilma, and Lovette
5 Kargbo-Thompson will be diluted by the Apportionment Exclusion Order because, by excluding
6 millions of persons from the apportionment count, it will likely cause California to have fewer
7 Representatives spread across their home States of California and Georgia. *See Dep't of*
8 *Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-33 (1999) (state's expected loss
9 of a Representative following reapportionment conferred standing on the state's voters).

10 82. BAJI is harmed because the Apportionment Exclusion Order causes BAJI to
11 divert resources—including time and money—from other important matters that it ordinarily
12 would be addressing through presentations, workshops, publications, technical assistance, and
13 trainings. The Administration's decision to exclude all undocumented persons from the
14 apportionment calculations, and to require that the Department of Commerce and by extension
15 the Census Bureau report such information to the President, will discourage undocumented
16 immigrants from responding to the ongoing 2020 Census because of fear that the government
17 will identify and retaliate against undocumented persons who fill out the census. As another
18 federal court has already found, and the Supreme Court has upheld on review, undocumented
19 immigrants have a high nonresponse rate to the census and that rate is likely to increase
20 disproportionately if the administration of the census involves questions about citizenship. *See*
21 *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 578-85 (S.D.N.Y. 2019),
22 *aff'd in relevant part, rev'd in part and remanded sub nom. Dep't of Commerce v. New York*, 139
23 S. Ct. 2551 (2019). BAJI has spent and will continue to spend additional time and resources
24 educating and encouraging its partners and constituents to appropriately fill out the census in
25 order to counteract the chilling effect of the Apportionment Exclusion Order.

26 83. The exclusion of undocumented persons from the Representatives apportionment
27 among the States will frustrate and undermine BAJI's core mission of promoting equal and just
28 laws through building coalitions and initiating campaigns with African Americans and Black

1 immigrants, and fostering racial, economic, and social equality for the communities it serves.
2 *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *see also Fair Hous. of Marin v.*
3 *Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487,
4 2020 WL 3637585, at *9 (9th Cir. July 6, 2020).

5 84. BAJI is also indirectly harmed by the injury to its individual members, including
6 Plaintiffs Yilma and Kargbo-Thompson set forth above, and thus has associational standing to
7 sue on behalf of those injured members. Just as Plaintiffs Yilma and Kargbo-Thompson have
8 standing to sue in their own right, other BAJI members are similarly situated. The interests
9 sought to be protected by this Complaint are germane to BAJI's purpose as an organization,
10 including having legal apportionment in the House to build coalitions and initiate campaigns
11 with African Americans and Black immigrants. The claims and relief requested here do not
12 require participation of BAJI's individual members. *See Hunt v. Wash. State Apple Advert.*
13 *Comm'n*, 432 U.S. 333, 343 (1977); *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938
14 F.3d 1147, 1155 (9th Cir. 2019).

15 85. Finally, all Plaintiffs—Sam Liccardo, Zerihoun Yilma, Lovette Kargbo-
16 Thompson, BAJI, the City of San Jose, King County, and Arlington County—will be harmed by
17 the chilling effect of the Apportionment Exclusion Order on the response rate to the ongoing
18 2020 Census, as discussed above. As noted, the Order's announcement that undocumented
19 immigrants will not be counted in the apportionment base is likely to disproportionately suppress
20 the response rate from undocumented immigrants. And the lower response rate from
21 undocumented immigrants caused by the Order will harm all Plaintiffs by diminishment of
22 political representation, loss of federal funds, degradation of census data, and diversion of
23 resources.

24
25
26
27
28

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

**Violation of Apportionment and Enumeration Clauses, and Fourteenth Amendment
(U.S. Const., art. I, § 2; amend. XIV, § 2)**

86. Plaintiffs incorporate by reference the above allegations in this Complaint.

87. The Apportionment and Enumeration Clauses provide that “Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined” based on the number of “persons” in each state according to an “actual Enumeration.” U.S. Const. art. I, § 2.

88. The Fourteenth Amendment requires the apportioning of Representatives among the States based on “the whole number of persons in each State.” U.S. Const., amend. XIV, § 2.

89. Constitutional text, history, and precedent recognize undocumented immigrants as persons.

90. The Apportionment Exclusion Order denies that undocumented immigrants are “persons” for purposes of apportionment and directs that they be excluded from the apportionment base following the 2020 Census.

91. These constitutional violations have caused, are causing, and will continue to cause harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief will redress this harm.

SECOND CLAIM FOR RELIEF

**Violation of the Fifth and Fourteenth Amendments—Malapportionment
(U.S. Const., amend. V, XIV)**

92. Plaintiffs incorporate by reference the above allegations in this Complaint.

93. The Due Process Clause of the Fifth Amendment prohibits the federal government from denying equal protection of the law.

94. The Equal Protection Clause of the Fourteenth Amendment, made applicable to the federal government by the Due Process Clause of the Fifth Amendment, provides that the government may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV, § 1, cl. 2.

1 pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141, and thereby unlawful.

2 104. These *ultra vires* violations have caused, are causing, and will continue to cause
3 harm to Plaintiffs as alleged above, and there is a substantial likelihood that the requested relief
4 will redress this harm.

5 **FOURTH CLAIM FOR RELIEF**

6 **Violation of the Fifth and Fourteenth Amendments—Intentional Discrimination (U.S. Const., amend. V, XIV)**

7 105. Plaintiffs incorporate by reference the above allegations in this Complaint.

8 106. The Apportionment Exclusion Order is also unlawful because it violates the core
9 constitutional protections against unlawful discrimination enshrined in the Due Process and
10 Equal Protection Clauses of the Fifth and Fourteenth Amendments.

11 107. The Due Process Clause of the Fifth Amendment prohibits the federal
12 government from denying any person “equal protection of the laws” and, co-extensive with the
13 equal protection guarantee of the Fourteenth Amendment, prevents the federal government from
14 discrimination on the basis of race, ethnicity, national origin, and citizenship. U.S. Const.
15 amend. V.

16 108. These protections apply to every person within the jurisdiction of the United
17 States—regardless of citizenship status, “documentation,” or any other attempted classification
18 criteria. *See, e.g., Plyler*, 457 U.S. at 210-12.

19 109. Under these principles, applicable to undocumented immigrants, “invidious
20 discriminatory purpose” cannot be “a motivating factor” in government action. *Vill. of Arlington
21 Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

22 110. Contrary to these guarantees of Due Process and Equal Protection, the
23 Apportionment Exclusion Order is motivated by an intent to discriminate against Black and
24 Latino people (generally, and, in particular, Black and Latino immigrants), as demonstrated by
25 the President’s consistent conduct disparaging members of these communities and seeking to
26 dilute their political power.

27 111. The history here—culminating in the Apportionment Exclusion Order—is
28 extensive. There is widespread public coverage of the President making numerous statements

1 indicating animosity toward communities of color. *See, e.g.*, Josh Dawsey, *Trump derides*
2 *protections for immigrants from ‘shithole’ countries [Haiti, El Salvador, African countries]*,
3 *Washington Post* (Jan. 12, 2018, 4:52 AM PST),
4 [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html)
5 [shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html)
6 [31ac729add94_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html); Donald J. Trump Statement on Preventing Muslim Immigration (Dec.
7 7, 2015) [https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-](https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration)
8 [releases/donald-j.-trump-statement-on-preventing-muslim-immigration](https://web.archive.org/web/20160204082711/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration); Eugene Scott, *Trump’s*
9 *History of Making Offensive Comments about Nonwhite Immigrants*, *Washington Post*, Jan. 11,
10 2018; Julia Hirschfeld Davis et al, *Trump Alarms Lawmakers with Disparaging Words for Haiti*
11 *and Africa*, *NY Times* (Jan. 11, 2018), [https://www.nytimes.com/2018/01/11/us/politics/trump-](https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html)
12 [shithole-countries.html](https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html); Matthew Choi, *Trump focuses on white people killed by police, defends*
13 *Confederate flag*, *Politico* (July 14, 2020, 5:45 PM EDT),
14 <https://www.politico.com/news/2020/07/14/trump-racism-confederate-flag-police-361205>.

15 112. The general statements then turned to attempts by President Trump to weaken
16 these communities. For example, in 2018, the President referred to Sanctuary laws and policies
17 as a “ridiculous, crime infested & *breeding* concept,” likening undocumented immigrants
18 protected by such laws and policies to animals. Z. Byron Wolf, *Trump blasts ‘breeding’ in*
19 *sanctuary cities. That’s a racist term* (last updated, April 24, 2018, 11:58 PM ET),
20 <https://www.cnn.com/2018/04/18/politics/donald-trump-immigrants-california/index.html>
21 (emphasis added); *see also* Remarks by President Trump at a California Sanctuary State
22 Roundtable (May 16, 2018), [https://www.whitehouse.gov/briefings-statements/remarks-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/)
23 [president-trump-california-sanctuary-state-roundtable/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/). And President Trump repeatedly tried to
24 withhold federal funding from such states and cities, and continues to do so today, even in the
25 midst of a global pandemic that has significantly harmed undocumented immigrants. *See, e.g.*,
26 Keya Vakil, *Trump to States: Crack Down on Sanctuary Cities or I’ll Hold Back Coronavirus*
27 *Aid* (last updated, May 12, 2020, 9:14 AM EDT),
28 <https://couriernewsroom.com/2020/04/30/trump-to-states-crack-down-on-sanctuary-cities-or-ill->

1 [hold-back-coronavirus-aid/](#); Louise Radnofsky & Rebecca Ballhaus, *Trump Revives Idea on*
2 *'Sanctuary Cities' Amid Stepped Up Immigration Push*, Wall Street Journal (Apr. 12, 2019),
3 [https://www.wsj.com/articles/trump-giving-strong-considerations-to-proposal-to-place-](https://www.wsj.com/articles/trump-giving-strong-considerations-to-proposal-to-place-immigrants-who-enter-u-s-illegally-in-sanctuary-cities-only-11555087547)
4 [immigrants-who-enter-u-s-illegally-in-sanctuary-cities-only-11555087547](https://www.wsj.com/articles/trump-giving-strong-considerations-to-proposal-to-place-immigrants-who-enter-u-s-illegally-in-sanctuary-cities-only-11555087547).

5 113. In 2019, the President's focus turned to limiting and diluting the voting power of
6 these groups—by seeking to add a question about citizenship to the 2020 Census. When
7 challenged about the propriety of this sudden addition, Secretary Ross claimed it was necessary
8 to enforce the Voting Rights Act. But the courts saw through this. Secretary Ross's decision
9 was enjoined by three district courts, and one of those cases ended up before the Supreme Court,
10 which vacated Secretary Ross's decision because his stated rationale was “contrived” and
11 “pretextual.” *Dep't of Commerce v. New York*, 139 S. Ct. at 2575-76.

12 114. It was later revealed that Thomas Hofeller, a prominent redistricting strategist for
13 the Republic Party, was involved in drafting portions of the letter from DOJ seeking to add the
14 citizenship question, including portions related to the pretextual basis. *See* NYIC Pls.' Mot. for
15 Sanctions, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF, ECF
16 No. 635-1 at 124-136 (S.D.N.Y. July 16, 2019); Def's Opp. to Ltr. Mot. to Compel, *N.Y.*
17 *Immigration Coal. v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 451 at 3 (S.D.N.Y.
18 Oct. 30, 2018). This was the same Thomas Hofeller who, in 2015, prepared a study titled “The
19 Use of Citizen Voting Age Population in Redistricting,” in which he recommended adding a
20 citizenship question to the Census so that states could use citizen voting age population rather
21 than total population to redistrict. According to Hofeller, this change would be “advantageous to
22 Republicans and non-Hispanic Whites,” while diluting the political power of Hispanics. *See*
23 <https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf> (last
24 accessed July 27, 2020).

25 115. President Trump himself weighed in, so as to leave no question about what had
26 driven him to add the census question struck down by the Supreme Court. On July 5, 2019, just
27 eight days after the Supreme Court's decision, the President publically confirmed that he had
28 sought to add the citizenship question *not* to enforce the Voting Rights Act, but rather “for

1 districting” and “for appropriations,” consistent with his attempts to withhold funding from
2 Sanctuary states and cities. Remarks by President Trump Before Marine One Departure (July 5,
3 2019), [https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/)
4 [departure-51/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/).

5 116. Taken together, the volume and consistency of the President’s statements and
6 action demonstrate discriminatory intent. Indeed, based on the President’s own statements, this
7 Court has itself previously concluded that there is “evidence that Defendant Trump harbors an
8 animus against non-white, non-European aliens.” *See* Order Granting Plfs.’ Mot. for Prelim. Inj.,
9 *Ramos v. Nielsen*, No. 18-cv-01554-EMC, ECF No 128 at 30 (N.D. Cal. Oct. 3, 2018).

10 117. That leads to the present. In the last two weeks alone, President Trump has noted
11 that “many” immigrants from Central America “are in prison for rape, murder, lots of other
12 things,” and blamed Mexican immigrants for the increased number of COVID-19 cases in the
13 United States, claiming that “sharing a 2,000-mile border with Mexico” has caused a surge in
14 cases. *See* Remarks by President Trump in Press Conference (July 14, 2020),
15 [https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference-071420/)
16 [071420/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference-071420/); Daniel Dale, et al., *Fact check: Trump falsely suggests kids don't transmit coronavirus*
17 *and that US case surge is due in part to protests and Mexican migration* (last updated, July 22,
18 2020, 9:48 PM ET), [https://www.cnn.com/2020/07/22/politics/fact-check-trump-coronavirus-](https://www.cnn.com/2020/07/22/politics/fact-check-trump-coronavirus-briefing-july-22/index.html)
19 [briefing-july-22/index.html](https://www.cnn.com/2020/07/22/politics/fact-check-trump-coronavirus-briefing-july-22/index.html).

20 118. And then—on July 21, 2020—President Trump issued the Apportionment
21 Exclusion Order at issue here. It was a sudden decision, with little or no explanation, and one
22 that departs from the long-standing policy and practice of the United States. And it was made
23 before the Census Bureau even developed, let alone tested a technical means to provide the
24 required information, was made without input from the public, and was made without following
25 typical agency process. This “specific sequence of events,” especially given the “historical
26 background” involving the pretext of his initial census attempt, is strong indicia of discrimination
27 and demonstrate improper motive. *Arlington Heights*, 429 U.S. at 267.

28

1 119. But there is direct evidence, too. The motivation is laid out in the Apportionment
 2 Exclusion Order itself, which states point blank that it seeks to punish States that the President
 3 says have adopted “policies that encourage illegal aliens to enter this country.” And there is no
 4 question that the Apportionment Exclusion Order disproportionately impacts Black and Latino
 5 communities. *Id.* at 266 (citing to *Washington v. Davis*, 426 U.S. 229, 242 (1976)). States and
 6 communities that will suffer adversely from Defendants’ decision are those with large
 7 populations of undocumented immigrants. Undocumented immigrants are disproportionately
 8 located in States, like California and Texas, that also have large Latino and Black populations.
 9 Those States are most likely to be disadvantaged by Defendants’ action.

10 120. In light of the above, the Apportionment Exclusion Order issued by President
 11 Trump is predicated on intentional discrimination against non-white, non-European
 12 undocumented immigrants and has caused, is causing, and will continue to cause harm to
 13 Plaintiffs as alleged above. The acts of the other Defendants have been and will be necessarily
 14 tainted by the President’s animosity toward communities of color. *Ramos v. Nielsen*, 321 F.
 15 Supp. 3d 1083, 1123-24 (N.D. Cal. 2018).

16 121. There is a substantial likelihood that the requested relief will redress this harm.

PRAYER FOR RELIEF

18 Plaintiffs respectfully request that this Court:

- 19 1. Declare that the Apportionment Exclusion Order’s directive to exclude
 20 undocumented persons from the apportionment base violates the U.S. Constitution;
- 21 2. Declare that the Apportionment Exclusion Order’s directive to exclude
 22 undocumented persons from the apportionment base is *ultra vires* and violates 2 U.S.C. § 2a(a)
 23 and 13 U.S.C. § 141;
- 24 3. Declare that any statement from the President to the Congress under 2 U.S.C.
 25 § 2a(a) that excludes undocumented persons residing in the United States from the
 26 apportionment base is be null and void;
- 27 4. Enjoin Defendants Department of Commerce, Census Bureau, Ross, Dillingham,
 28 from excluding undocumented persons from the apportionment base following the 2020 Census,

1 or acting in any capacity from assisting the President in excluding undocumented persons from
2 the apportionment base following the 2020 Census;

3 5. Enjoin Defendant Johnson from transmitting to the States any statement or
4 apportionment determination from the President that excludes undocumented persons from the
5 apportionment base;

6 6. Award Plaintiffs costs, expenses, and reasonable attorneys' fees;

7 7. Award any other relief the Court deems just and proper;

8 8. Maintain jurisdiction and monitorship over the action until such time as the
9 statement set forth in 2 U.S.C. § 2a(a), which appropriately counts undocumented persons as
10 persons and is otherwise consistent with the mandates of the Constitution and relevant statutes, is
11 provided to Congress.

12 Dated: July 27, 2020

LATHAM & WATKINS LLP

13 By: /s/ Sadik Huseny

14
15 Steven M. Bauer (Bar No. 135067)
16 Sadik Huseny (Bar No. 224659)
17 Amit Makker (Bar No. 280747)
18 Shannon D. Lankenau (Bar. No. 294263)
19 **LATHAM & WATKINS LLP**
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Telephone: 415.391.0600
Facsimile: 415.395.8095

20 Richard P. Bress (*pro hac vice* pending)
21 **LATHAM & WATKINS LLP**
22 555 Eleventh Street NW, Suite 1000
Washington, D.C. 20004
Telephone: 202.637.2200
Facsimile: 202.637.2201

23
24 *Attorneys for Plaintiffs City of San Jose,*
25 *California; King County, Washington;*
26 *Arlington County, Virginia; Black Alliance for*
27 *Just Immigration; Sam Liccardo; Zerihoun*
28 *Yilma; and Lovette Kargbo-Thompson*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Kristen Clarke (*pro hac vice* pending)
Jon M. Greenbaum (Bar No. 166733)
Ezra D. Rosenberg (*pro hac vice* pending)
Dorian L. Spence (*pro hac vice* pending)
Maryum Jordan (Bar No. 325447)
Ajay Saini (*pro hac vice* pending)
**LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW**
1500 K Street NW, Suite 900
Washington, DC 20005
Telephone: 202.662.8600
Facsimile: 202.783.0857

*Attorneys for Plaintiffs City of San Jose,
California; King County, Washington; Black
Alliance for Just Immigration; Sam Liccardo;
Zerihoun Yilma; and Lovette Kargbo-Thompson*

Mark Rosenbaum (Bar No. 59940)
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: 213.385.2977
Facsimile: 213.385.9089

Attorneys for Plaintiff City of San Jose