UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, ET AL.,

Plaintiffs,

vs. Case No. 2:18-CV-00772-RDP

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.
Monday, March 2, 2020

Deposition of:

KAREN BATTLE

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:43 a.m., when were present on behalf of the respective parties:

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VIDEOGRAPHER: Scott Forman

P R O C E E D I N G S

WHEREUPON,

VIDEOGRAPHER: Good morning. We're going on the record at 9:43 a.m. on March 2nd, 2020. Please note the microphones are sensitive and may pick up whispering, private conversations and cellular interference. Please turn off all phones or place them away from the microphones, as they can interfere with the deposition audio. Audio and video recording will continue to take place unless all parties agree to go off the record.

This is Media Unit 1 of the video recorded deposition of Karen Battle taken by counsel for defendant in the matter of State of Alabama v. United States Department of Commerce, et al., filed in the U.S. District Court Northern District of Alabama 2:18-CV-007772-RDP. This deposition is being held at the Department of Commerce located at 1401 Constitution Avenue, N.W., Washington, D.C. 20230.

My name is Scott Forman with the firm of Veritext Legal Solutions, and I'm the

videographer. The court reporter is Karen Jorgenson from the firm Veritext Legal Solutions. I am not authorized to administer an oath. I am not related to any party in this action, nor am I financially interested in the outcome.

All appearances will be noted on the stenographic record.

Will the court reporter please swear in the witness?

KAREN BATTLE

called as a witness, and having been first duly sworn, was examined and testified as follows:

THE WITNESS: Yes.

VIDEOGRAPHER: You may proceed.

EXAMINATION

BY MS. MEYER:

Q Hi, Ms. Battle.

A Hello.

Q My name is Amanda Meyer, and I am counsel for defendant intervenor the State of New York.

A Uh-huh.

Q Can you please state and spell your name for the record?

A My name is Karen Battle; K-A-R-E-N, B-A-T-T-L-E.

Q And have you ever been deposed before?

A Yes.

Q How many times?

A Twice.

Q I'm just going to go over some ground rules for our deposition here today.

First, I'm going to ask you to answer verbally, so that the court reporter can get down your answers, okay?

A Yes.

Q I ask that you allow me to finish each question before you begin your answer, and I will make sure that you have finished your answer before I ask my next question, okay?

A Yes.

Q If you don't understand a question, will you let me know?

A Yes.

Q If you do answer, I will assume you understood, okay?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: Yes.

BY MS. MEYER:

Q If you need a break, let me know but finish the answer.

Sometimes it might happen that you won't give an answer as completely as you can and then at some point later you remember some additional information or some perhaps clarification in response to that earlier question. If that happens to you, will you please tell me that you would like to add something to that earlier answer, and we will do that right then while it's on your mind?

A Yes.

Q In addition, it might occur to you at some point that a previous answer you gave was not completely accurate. If that happens, would you tell me and make any necessary corrections to your answers?

A Yes.

Q Is there any reason why you could not provide your best and most accurate testimony today?

A No.

Q Did you review any documents to prepare for this deposition?

A Yes.

Q What did you review?

A I reviewed the exhibits from the previous deposition and documents that are going to be shared today.

Q And by "documents that are going to be shared today," do you mean the documents that counsel handed to us at the beginning of the deposition?

A Yes.

Q Okay. I know we talked a little bit about this at your first deposition -- deposition, but can you please tell us your current title?

A Yes. My current title is chief of the population division at the U.S. Census Bureau.

Q And how long have you served in that capacity?

A I have served as division chief since November of 2014.

Q And what are your job duties?

A My duties are to oversee staff who are developing and/or disseminating basic demographic data on the United States primarily.

Q Who does the Census Bureau count in the decennial census?

MR. SVERDLOV: Objection. Leading.

THE WITNESS: The Census Bureau has residence criteria, but our goal is to count people, who are usual residents [sic] of the United States.

BY MS. MEYER:

Q And what do you mean by "usual residence [sic]"?

A The Census Bureau defines usual residents as the place where people live and sleep most of the time.

Q Who is included in the apportionment

population count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The apportionment population count includes two main components. First you have the resident population, those who were counted as residing at their usual residence in the U.S. Plus, you have the federally affiliated overseas count. Those two components are added together and that creates the apportionment population count.

BY MS. MEYER:

Q What level of geography is used for apportionment?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The apportionment population totals are produced at the state level.

BY MS. MEYER:

Q I'm going to ask you a number of questions today about legal noncitizens and undocumented immigrants or undocumented residents.

A Uh-huh.

Q When I use the term "legal noncitizen,"

do you understand me to mean any non-U.S. citizen who has formal immigration status?

MR. SVERDLOV: Objection. Misleading and vague.

BY MS. MEYER:

Q Could you, please, repeat that?

A Yes, of course.

Q When I use the term -- when I use the term "legal noncitizens," I mean any non-U.S. citizen who has formal immigration status, okay?

A Yes.

Q And when I use the term "undocumented immigrant" or "undocumented resident," I mean those persons who are present in the United States by virtue of either illegal entry in violation of federal immigration statutes or who have entered the United States legally but have remained present in the country beyond the period of time permitted by federal law, okay?

A I understand what you're saying, yes.

Q With respect to the apportionment count, the apportionment count is an actual enumeration,

correct?

MR. SVERDLOV: Objection. Vague. Misleading. Calls for a legal conclusion.

THE WITNESS: The decennial census's goal is to count people in the United States and the Federally Affiliated Count Overseas.

BY MS. MEYER:

Q Is the apportionment count an actual enumeration?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The decennial census collects data in a number of ways. The primary way is to collect information directly from --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- information directly from respondents. So the Census will ask individuals in housing units to respond to the decennial census. The Census Bureau may use proxies to collect that information, or the Census Bureau may use other methodologies to collect information and to assign information to

individuals.

BY MS. MEYER:

Q Is the apportionment count an estimate?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The apportionment count is not an estimate.

BY MS. MEYER:

Q And why not?

A Because it is based on the decennial census which the goal of that is to collect data for the entire population.

Q What statistical tools can be used for the apportionment?

MR. SVERDLOV: Objection. Vague. Assumes facts not in evidence.

THE WITNESS: I'm not sure I understand what you mean by "statistical tools."

BY MS. MEYER:

Q Can the Census Bureau use a sampling, for instance, for the apportionment?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Title 13 states that sampling is not to be used for the apportionment.

BY MS. MEYER:

Q So the Census Bureau does not use sampling with respect to the apportionment?

A No.

Q Can the Census Bureau use estimations as part of the apportionment?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not sure what you mean by "estimation."

BY MS. MEYER:

Q Does the Census Bureau use estimating as a part of the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Data collected in the decennial census does go through an editing and imputation process.

BY MS. MEYER:

Q For the purposes of the apportionment count?

A And those data are then developed into

the resident population counts that are used in the apportionment count.

Q Does the Census Bureau use any modeling with respect to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau does use techniques to help it develop accurate information for the decennial census.

BY MS. MEYER:

Q Are those techniques characterized as modeling?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau may use a statistical model, for example, to help it determine the status of housing units that are going to be -- to have data collected from those housing units for the decennial census. So the model may help the Census Bureau determine if a -- an address is existent or vacant or occupied.

BY MS. MEYER:

Q And in addition to that, what other techniques might the Census Bureau use?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you please repeat what you're asking? The statistical techniques?

BY MS. MEYER:

Q Yes.

You mentioned that the Census Bureau might use techniques to help get a count for apportionment.

A Yes. Uh-huh.

Q You mentioned one of those techniques is modeling --

A Uh-huh.

Q -- which we just discussed.

Are there other techniques that the Census Bureau uses to get an apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The -- the Census Bureau, as we mentioned, uses techniques to -- to process data. The Census Bureau uses techniques in the collection of data. So there really are a number of different approaches or techniques that the Census Bureau uses to develop the data used for

the apportionment process.

BY MS. MEYER:

Q So in collecting data, what are those techniques?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: So, as we mentioned earlier, the Census Bureau uses statistical modeling to help it determine the status of housing units. This is important for the nonresponse follow-up operation where we need to determine if housing units are in existence or vacant or if they are occupied.

And in the case of the nonresponse follow-up, if the Census Bureau is not able to obtain information directly from the residence of that particular housing unit and if the Census Bureau is able to link that housing unit with administrative records, then the Census Bureau is able to utilize that information to do an enumeration, for example.

BY MS. MEYER:

Q Okay. And any other techniques with

respect to the collection of data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: That is difficult to answer. I think the Census Bureau's operational plan actually lays out all of the different operations that our Census Bureau intends to conduct for the decennial census to collect the data, to process the data. And that plan would lay out all of the different processes and procedures we're planning to use to develop Census data.

BY MS. MEYER:

Q In addition to the statistical modeling that we've been discussing, does the Census Bureau use imputation for the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The count imputation is the method that the Census Bureau uses, and count imputation is included in the resident population. So count imputation is indeed used in developing the resident population which is part of the apportionment calculation count.

BY MS. MEYER:

Q Is there a difference between imputation and modeling?

A I would describe it as imputation is a form of modeling.

Q Is it the case that if you are using imputation you are filling in a value, like, for example, the number of people in a housing unit?

A With imputation you are working to provide information that is missing.

Q Is there a distinction in modeling where you're getting a probability of something, like a value for race or ethnicity?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: It may be that a statistical model may be developed to produce probability of some characteristics. That's a possibility.

BY MS. MEYER:

Q But it can also -- but the modeling can also be used not to produce probability for

something else?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: I'm not sure I understand your question.

BY MS. MEYER:

Q Withdrawn.

You said that modeling can be used to develop a probability, correct?

A Yes.

Q Could the results of modeling be something other than a probability?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I think that depends on the statistical model that you are developing.

BY MS. MEYER:

Q Is it possible?

A It may be possible.

Q What is the master address file?

A The master address file is the frame that the Census Bureau developed that includes the listing of the housing unit addresses and

reporter's addresses that we are aware of in the United States. And that frame is developed and utilized as we design your data collection procedures.

Q To get the apportionment count, does the Census Bureau first send a questionnaire to all addresses in the master address file?

A The Census Bureau designates certain areas of the country to have certain types of contact strategies. So the majority of the country would fall into the category where they are being mailed out contact information typically requesting them to go online, but then there are other instances where a questionnaire may be sent.

But contact strategy has been developed for the Census that eventually even has a unit where we are requesting online participation. If we don't hear from them, eventually they will get a paper questionnaire.

Q So the contact strategy, if I'm understanding correctly, you will either be mailed out information requesting that you go online and

fill out the questionnaire, or you will be mailed a questionnaire to fill out in the first instance; is that right?

A There are other segments of the country where the Census Bureau will not mail out anything but will go out to those areas to do the enumeration; for example, remote Alaska or rural parts of Maine, for example, is another area.

Q And with that contact strategy, to go directly out to do the enumeration, is it the case that -- that individuals who are contacted are filling out the questionnaire?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: The -- it may be the case where if it's an enumerator conducting the interview, the enumerator is basically interviewing someone in the household and capturing their information.

BY MS. MEYER:

Q And the interview would be based on the questionnaire?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The interview -- the information that the interviewer is trying to collect from the housing units would be based on the questionnaire.

BY MS. MEYER:

Q And if you do not receive a response to the questionnaire from a housing unit, does the Census Bureau impute a number to produce a count for the housing unit?

A The Census Bureau does have a strategy that it utilizes where it needs to determine if housing units are, again, existent addresses or existent or occupied or vacant. For housing units that the Census Bureau determines are occupied and if we do not have any information for those particular housing units, then the Census Bureau may impute a population count for those housing units.

Q What percentage of housing units does the Census Bureau impute a count for?

A I do not have the that statistic off the

top of my head.

Q And if you wanted to find that statistic, where we would go?

A There are assessment reports online from the December census of 2010 where that information would be provided. In particular, it's the item imputation report from the 2010 census that should have that information or similar reports that looked at imputation from the 2010 census.

Q How is the apportionment count different from redistricting?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: So the difference is that the apportionment population count includes these two components. We have the resident population plus the Federally Affiliated Count Overseas. That's the apportionment population.

The redistricting data utilized only the residual -- the resident population data. The redistricting does not utilize data for the federally affiliated overseas.

BY MS. MEYER:

Q Are there any other differences?

A The redistricting data includes characteristics in terms of data on age, data on race and ethnicity; and the level of geography goes down to the block level whereas the apportionment is at the state level.

Q Okay. Any other differences?

A Those are the main differences.

MS. MEYER: Will the court reporter please mark as Exhibit Number 1?

(Exhibit 1, Update on Disclosure Avoidance and Administrative Data, was marked.)

MS. MEYER: Ms. Battle has been handed document Exhibit 1 called, "Update on Disclosure Avoidance and Administrative Data," dated September 13, 2019. This document has been stamped.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q Did the Census Bureau author this

document?

A Staff at the Census Bureau authored this document.

Q Okay. And if we can turn to Page 9 of the document -- it's Page 9, and if you're following the Bates stamps it's P50.

A Uh-huh.

Q This slide is titled "Apportionment."

A Uh-huh.

Q And if you look at the second to last bullet point, it states, "The apportionment counts are calculated using the census unedited file which is produced by November 30th, 2020."

Did I read that correctly?

A Yes.

Q What is the census unedited file?

A The census unedited file is a file that contains responses collected from the decennial census for the country and the -- the resident population, and this includes data that have not gone through characteristics editing and imputation. The population totals are final in

this particular file but data on other characteristics -- age, race, ethnicity -- those data are unedited at this point and have not completed processing.

Q And why does this Census Bureau use the unedited file for apportionment?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau needs to use a data file that has the final population counts and this is the first file in which those data will be available and utilized for apportionment.

BY MS. MEYER:

Q If you turn to Page 10 of the same document, Exhibit 1, the second bullet point referring to redistricting states, "These data are produced from the census edited file which is produced from the CUF by imputing items missing data using administrative records and statistical models."

Did I read that correctly?

A Yes.

Q And what does the "CUF" refer to?

A The "CUF" refers to the census unedited file.

Q And what is the "census edited file"?

A The "census edited file" is the next file in the phases of processing decennial census data. So the census unedited file again has the final population counts; but the rest of the data is unedited, so there could be missing values for age race or ethnicity at that point.

So we then take the data from the CUF and then put that through the editing and imputation process to develop the census edited file; and at the end of the production of the census edited file, we now have complete data for age, race, ethnicity and these other characteristics that were previously unprocessed in the CUF.

Q And do you ever use this edited file for apportionment counts?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: No.

BY MS. MEYER:

Q Why not?

A The census edited file is not needed for the apportionment. And the census edited file, while it does have final census counts on it that came from the CUF, those data are not processed until we get into January; and the Census Bureau needs to develop apportionment data in December in order to make our mandated delivery by the end of December.

Q Do the counts between the files match?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The population count total stays the same.

BY MS. MEYER:

Q What is the American Community Survey?

A The American Community Survey is the largest household survey that the Census Bureau undertakes.

Q And what does ACS ask about?

A The American Community Survey does ask about basic demographic characteristics similar to a decennial census; but in addition to that, it

has a number of socioeconomic questions about income, education, all of those kinds of -- marital status, a lot of things that we do not have on the decennial census short form.

Q Does the ACS ask about citizenship status?

A Yes.

Q Does it ask about legal status?

A No.

Q When I say "legal status," to clarify, I mean whether someone is a legal noncitizen or undocumented resident, okay?

A The ACS does not ask about that.

Q Does the ACS cover the entire population?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The American Community Survey is a sample, so a sample of housing units are selected, and -- and we collect their information and then those data are weighed to represent the full population.

BY MS. MEYER:

Q And how are they selected?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau starts off with the master address frame. The same frame that's used for the decennial census and housing units are selected for each county throughout the United States to participate in the survey.

BY MS. MEYER:

Q Are they selected at random?

A The mathematical statisticians at the Census Bureau determine a sampling rate by which they will sample housing units within those counties.

Q But the particular ones that are chosen, are those at random?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Based on the sampling rate that the mathematical statisticians have determined.

BY MS. MEYER:

Q And you said that ACS covers a sample of the population; is that correct?

A Yes.

Q What percentage of the population does it cover?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The American Community Survey every year samples, I believe, 3.5 million addresses, which roughly is a few percentages of the total available in the United States.

BY MS. MEYER:

Q The total available population in the United States?

A The total addresses.

Q And is the ACS subject to uncertainty?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Yes.

BY MS. MEYER:

Q For what?

A Well, there are sampling errors as well as nonsampling errors and that contributes to uncertainty.

Q What do you mean by "sampling errors"?

A This goes to the design of the sample for the American Community Survey, and it may be that

some parts of the sample may not be as representative of the full population.

Q Is there a margin of error for ACS?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The American Community Survey statistics that are published are provided with a margin of error for most statistics.

BY MS. MEYER:

Q And what is that margin of error?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The margin of error, it varies. The Census Bureau uses mathematical statistics to generate margin of errors, and so the actual value of the margin of errors may vary depending on what the statistic is. But it basically provides an interval within which the true estimate of the population is expected to lie in that.

BY MS. MEYER:

Q And can you estimate what the range of that interval usually is?

A The margin of error usually tells you the

range in the census, that it is the estimate plus or minus a particular number.

Q And is there an estimate you can give of that particular number -- --

MR. SVERDLOV: Objection.

BY MS. MEYER:

Q -- understanding that it varies?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: I'm not sure I understand the question.

BY MS. MEYER:

Q Would it be fair to say that usually the margin of error is around plus or minus 10 percent?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: No. The margins of error vary depending on the actual estimate and the level of geography.

BY MS. MEYER:

Q And if I wanted to find out what those margins of error are, where would I go?

A When the Census Bureau publishes its

American Community Survey data, you will see the margin of error in the data products along with the actual estimate.

Q So each time the ACS is published, it is also published with a margin of error; is that correct?

A ACS publishes its estimates along with a margin of error.

Q What standards are the apportionment numbers held to?

MR. SVERDLOV: Objection. Vague. Calls for a legal conclusion.

THE WITNESS: The Census Bureau follows its statistical quality standards.

BY MS. MEYER:

Q And these statistical quality standards apply to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The statistical quality standards apply to all information products that come out of the Census Bureau.

BY MS. MEYER:

Q And the apportionment count is an information product?

A Yes.

MS. MEYER: Will the court reporter, please, mark this document Exhibit 2?

(Exhibit 2, Federal Register Volume 79, dated September 2nd, 2014, Statistical Policy Directive Number 1, was marked.)

MS. MEYER: Ms. Battle has been handed a document which the court reporter has marked as Exhibit 2. It's a portion of the Federal Register Volume 79, dated September 2nd, 2014, Statistical Policy Directive Number 1.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q Do you recognize this document?

A Yes.

Q What is the purpose of this document?

MR. SVERDLOV: Objection. Vague. Calls for legal conclusion.

THE WITNESS: This document was published by the Office of Management and Budget, and the purpose was to provide guidance for federal agencies in terms of their fundamental responsibilities for producing data.

BY MS. MEYER:

Q And is the Census Bureau included in those federal agencies?

A Yes.

Q Does the Census Bureau adhere to this guidance generally?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Yes.

BY MS. MEYER:

Q And does this guidance apply to this apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: This guidance would apply to all data coming out of the Census Bureau, including the apportionment count.

BY MS. MEYER:

Q If you can turn to 71,611.

A Uh-huh.

Q If you look at the bottom right corner of this document, it explains the principles and practices for a federal statistical agency, in parentheses, principles and practices issued by the National Research Council of the National Academy of Sciences, correct?

A Yes.

Q And if you look at the bottom of that paragraph, it says four principles are identified, correct?

A Yes.

Q And if you look at Number 1, the first principle is "Relevance to public policy issues," correct?

A Yes.

Q What does "Relevance to public policy issues" mean?

MR. SVERDLOV: Objection. Calls -- vague. Calls for legal conclusion, and to the extent that this is asking about a document promulgated by OMB, it would be outside the scope

of the deposition unless it is speaking to the Census Bureau's interpretation.

BY MS. MEYER:

Q What does the "Relevance to public policy issues" mean to the Census Bureau?

A The Census Bureau's goal is to produce timely and relevant data, data that can be utilized by policymakers, researchers and in general data users.

Q And if you turn to the next page, 71,612, Principle Number 2 says "Credibility among data users," correct?

A Yes.

Q And what does that mean to the Census Bureau?

A This means that our goal is to produce accurate and reliable data that our data users find credible to meet their needs.

Q And what steps does the Census Bureau take to generally comply with this principle?

A The statistical quality standards that the Census Bureau publishes generally lays out

standards that cover every stage of the census and survey lifecycle from planning all the way through publication.

And so the Census Bureau follows these particular standards to guide us to help ensure that as we are designing the data collection, when we are testing our data collection, when we are processing our data, when we are reviewing our data and publishing data, that we are following these standards to help ensure the accuracy and reliability of the data.

Q And why is this principle important?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau's mission is to provide quality data about the nation's people and its economy, so we need to produce accurate and reliable data.

BY MS. MEYER:

Q Looking at Principle Number 3, "Trust among data providers," what does that mean to the Census Bureau?

A This means that the Census Bureau takes

steps to protect the confidentiality of respondents and their data and making sure that it's understood that when we collect data at the Census Bureau, they are for statistical purposes only. And the Bureau works hard to make sure when we do publish data, we're not publishing statistics that will allow for the disclosure and identity.

Q Does the Census Bureau need to tell a data provider what data will be used for?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you please repeat that?

BY MS. MEYER:

Q Does the Census Bureau need to tell a data provider what data will be used for?

MR. SVERDLOV: Same objection.

THE WITNESS: I'm not sure I understand what you're asking.

BY MS. MEYER:

Q Does the Census Bureau get data from other federal agencies, for instance?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau does have memorandums of understanding in place with other federal agencies so that we can acquire their data for our statistical purposes.

BY MS. MEYER:

Q And would we understand those other federal agencies in that arrangement to be a data provider to the Census Bureau?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Federal agencies do provide information to the Census Bureau.

BY MS. MEYER:

Q When those federal agencies provided data to the Census Bureau, does the Census Bureau need to let that data provider know what the data will be used for?

MR. SVERDLOV: Objection. Vague. Plus a legal conclusion.

THE WITNESS: In the memorandums of understanding that have been put in place, signed

and approved by both agencies, the agencies who are providing their data, will see in those agreements the purpose of those data and the intent we have to -- for using them.

BY MS. MEYER:

Q So in those agreements, the Census Bureau let's those agencies know what they intend to do with the data?

A Yes.

Q Once the Census Bureau lets the agencies know what they intend to do with the data, can the data be used for any other purpose than what the Census Bureau has said the data will be used for?

MR. SVERDLOV: Objection. Vague and compound. Calls for a legal conclusion.

THE WITNESS: The Census Bureau in its memorandum of understanding will lay out what the data are to be used for. The Census Bureau would need to go back to those data providers and perhaps modify the request if there's another purpose for which those data are intended to be used.

BY MS. MEYER:

Q And why is this important?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The Census Bureau needs to be very clear and have it clearly documented. When we are acquiring data from other federal agencies, we need to be clear with the purpose and make sure that we abide by that.

BY MS. MEYER:

Q And looking again at Exhibit 2; 71,612, at Principle Number 4, "Independence from political and other undue external influence," what does this mean to the Census Bureau?

A The Census Bureau is a statistical agency and we need to focus on the science behind developing and producing data and that needs to be our primary focus.

Q And how does that fit in to independence from political and other undue external influences?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau, again, needs to focus on its statistical, scientific procedures and processes and remain a neutral statistical agency.

BY MS. MEYER:

Q Does this include the appearance of influence?

MR. SVERDLOV: I'm sorry. Objection. Vague.

THE WITNESS: Could you please repeat that again?

BY MS. MEYER:

Q Does -- "Independence from political and other undue external influence," does this include the appearance of influence?

MR. SVERDLOV: That's the same question -- same objection.

THE WITNESS: The Census Bureau strives to focus on its scientific processes, statistical processes to do everything it can to remain neutral in the work it needs to conduct.

BY MS. MEYER:

Q And why is remaining neutral important?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Because the Census Bureau needs to make sure that we are focusing on statistics and science and letting that be all that guides us in our activities.

BY MS. MEYER:

Q If we go back, Exhibit 2, same document at 71, 611, if you look at the second column of this document, you'll see at the bottom of the second column, OMB's standards and guidelines?

A Yes.

Q If you go up to the paragraph before that, you'll see in the middle of that paragraph that part of these guidelines, "subject information, models and analytic results to independent peer review by qualified experts when appropriate."

A Yes.

Q And that applies to each federal agency, correct?

MR. SVERDLOV: Objection. Calls for a

legal conclusion and vague.

(Thereupon, the court reporter clarified.)

MR. SVERDLOV: Misleading.

THE WITNESS: This guidance is for all federal statistical agencies.

BY MS. MEYER:

Q Does the Census Bureau subject information, models and analytic results to independent peer review by qualified experts when appropriate?

A The Census Bureau utilizes experts to review methodologies at times. Those experts may be internal to the Census Bureau or those experts may be external.

Q And when does the Census Bureau do this?

A The -- there are many stages in which the Census Bureau is developing different aspects of conducting a census or conducting a survey, and the Census Bureau may choose as it is changing methodology or attempting to research and improve upon methodology -- those may be instances where

they may want to consult with experts in -- either internally or externally.

Q And you mentioned this practice with respect to surveys. Would this practice also apply with respect to statistical models?

A It could, yes.

Q And when, generally, would the Census Bureau ask experts to weigh in?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: If the Census Bureau was going to collect feedback, it would be during the development phase typically.

BY MS. MEYER:

Q So before a statistical model, for instance, was put in place for use?

A If the Census Bureau was seeking expert advice about a change in methodology or the use of a new methodology, that advice would be sought prior to finalizing that methodology and implementing that methodology.

Q In the development phase?

A It would be during development and

testing.

Q And why would the Census Bureau not seek input from these stakeholders or experts?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Could you, please, repeat that again?

MS. MEYER: Withdrawn.

BY MS. MEYER:

Q What circumstances generally in -- would the Census Bureau seek input from experts on a statistical model?

MR. SVERDLOV: Objection. Vague and asked and answered.

THE WITNESS: Specifically for statistical models? I think it depends on the statistical model. The use of it, the program that requires it, the intent for the use of those results from that model, that would help determine whether external input would be needed or not.

BY MS. MEYER:

Q So, for example, is it correct that the

Census Bureau is employing a new strategy for the 2020 census for the nonresponse follow-up operation?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau is utilizing a new strategy for the nonresponse follow-up operation.

BY MS. MEYER:

Q And is part of that strategy the use of a statistical model?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Part of that does include the use of statistical models.

BY MS. MEYER:

Q And do the Census Bureau receive input from qualified experts before using the statistical models?

A The Census Bureau has produced a number of presentations for advisory committees to talk about the research and regarding the use of the statistical models in nonresponse follow-up operations for 2020. So discussions have been

held with the advisory committee members about that.

Q And when were those discussions held?

A Those discussions were held throughout the decade as the program developed research and was prepared to come and present and talk about it with the advisory committees.

Q Okay. Same document, Exhibit 2, if you look at 71,614, if you look at the bottom right corner of that page, there is a "Note of Responsibility 1," correct?

A Uh-huh.

Q And it says, "Produce and disseminate relative and timely information."

What does the Census Bureau do to comply with this directive?

MR. SVERDLOV: Objection. Vague. Assumes facts not in evidence.

THE WITNESS: Well, the Census Bureau does work to determine what information we are collecting in our censuses and surveys, and the decision to collect certain data are normally tied

to some statistical need that other agencies may have -- programmatic needs, legislative needs -- so the data are relevant in that census and that the data are utilized for programs or other types of needs.

In terms of timely, the Census Bureau strives to produce its data on a regular cycle so that as things are changing in society, we are able to capture that in our data collections and produce data that reflects those changes in society.

BY MS. MEYER:

Q And why is this responsibility important to the Census Bureau?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: It's important because of your core mission, which is to provide quality data on the nation's people and --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- and its economy.

BY MS. MEYER:

Q If you look at Page 71,615 of Exhibit 2, you'll see on the first paragraph of that page about halfway in the middle of that first paragraph it says, "In addition" is where it starts.

A Uh-huh.

Q "In addition, federal statistical agencies and recognized statistical units must seek input regularly from the broadest range of private and public sector data users, including analysts and policymakers within federal, state, local, tribal and territorial government agencies, academic researchers, private sector businesses and constituent groups and nonprofit organizations."

Did I read that correctly?

A Yes.

Q And what does it mean that the Census Bureau must seek input from the broadest range of private and public sector of data users?

MR. SVERDLOV: Objection. Vague and

beyond the scope for the deposition above.

THE WITNESS: The Census Bureau conducts a lot of stakeholder engagements be it from having discussions with advisory committee meeting members, be it having tribal consultations with American Indian tribal leaders. The Census Bureau engages with population groups who have a unique requirement for data, maybe race or ethnicity.

So a lot of efforts are made to go out and talk to those who rely on these data as the Bureau is considering changes. It could be methodological changes or data changes to make them aware of work that we're doing and to seek input where -- where possible.

BY MS. MEYER:

Q Okay. And if you look at the same Page 71,615 of Exhibit 2, first column, "Responsibility 2, conduct credible and accurate statistical activities."

What does this mean to the Census Bureau?

A This really speaks to the statistical

quality standards that the Census Bureau issued where it lays out standards for every phase of the census's survey lifecycle so that we can infuse quality control or other measures to try to make sure that each phase is leading towards the most accurate data possible.

Q And for the apportionment count, what are those general phases?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Well, for the statistical quality standards, it starts with planning. It starts with making sure that you have an operational plan, that you have cost estimates, that you have a budget. The quality standards speak to when you're actually deciding the frame, how we need to make sure that the frame itself is accurate so there are quality control procedures built into address canvassing.

The Census Bureau then needs to focus on the instrument itself that we're going to use to collect the data; so measures have to be taken to ensure if it's an electronic instrument, for

example, that it's been verified, that what's being programmed matches our specifications. We have to do pretesting of questionnaires to ensure that what we intended to collect is how individuals are interpreting our questions, et cetera. So there are standards that speak to that.

There are standards to how we actually code and process the data once its collected in-house, again trying to ensure that we have the most accurate data possible. There are standards that speak to when it comes to developing data and reviewing data. There are also standards in terms of preparing to publish data.

So at every phase of this lifecycle, there are standards put into place to help the Bureau to produce as accurate data as possible.

BY MS. MEYER:

Q And going back to Responsibility Number 2, it says, "Conduct accurate statistical activities."

What does "accurate" mean in this context

to the Census Bureau?

A That, again, is guided by the statistical quality standards where standards are put into place that guides the Bureau on activities they need to conduct to help ensure the accuracy of the resulting data.

Again, it runs from developing the questionnaires, making sure we're doing pretesting, making sure as we develop electronic instruments we are verifying that we are programming things correctly.

So it's making sure that all of these phases we are following standards, and we are introducing quality control as much as possible.

Q Are there different kinds of accuracy relevant to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not sure I understand your question.

BY MS. MEYER:

Q So is numerical accuracy relevant to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau strives to develop as accurate a count as possible, for apportionment and other products.

BY MS. MEYER:

Q And could we describe the accuracy with respect to the count as numerical accuracy?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: I'm not sure I understand what you're asking.

BY MS. MEYER:

Q So accuracy with respect to the count -- withdrawn.

Is there -- withdrawn.

The Census Bureau, when it says "accuracy" with respect to the apportionment count, is there a consideration of accuracy by geography or population groups?

MR. SVERDLOV: Objection. Vague. Compound and misleading.

THE WITNESS: The Census Bureau strives

to produce as accurate a count as possible for apportionment for population groups.

BY MS. MEYER:

Q When you're striving to do that, "you" being the Census Bureau, do you take into account geographical variations?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not sure what you mean by geographical variations.

BY MS. MEYER:

Q So, for example, if you have a rural area of the country, do you adjust the method, for instance, of trying to count the population in such a rural area?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: So for that example, yes, the Census Bureau does determine what methodology might work best for particular environments. So, again, it could be that the method used for an American Indian reservation might be different than a city-style block, for example.

BY MS. MEYER:

Q In the apportionment count, does accuracy of the count in one state affect the accuracy of the count in another state?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau works to develop procedures and quality control to ensure accuracy in counts for all -- all states, so --

BY MS. MEYER:

Q Looking at Responsibility Number 3, conduct objective statistical activities --

A Uh-huh.

Q -- what does this mean to the Census Bureau?

I'm sorry. This is on Page 71,615.

A Okay.

Q If you look at Column 2, "Responsibility 3, conduct objective statistical activities" --

A Uh-huh.

Q -- what does this mean to the Census Bureau?

A So this speaks to the fact that the Census Bureau is a neutral statistical agency and that our goal is to focus on the best statistical methods and scientific methods to achieve our stated goals.

Q And if you look at that paragraph, same paragraph, it says, "The object -- objectivity of the information released to the public is maximized by making information available on an equitable, policy neutral, transparent, timely and punctual basis."

Does the Census Bureau comply with this responsibility?

MR. SVERDLOV: Objection. Vague. Calls for a legal conclusion.

THE WITNESS: The Census Bureau has as its goal to produce data that are timely, transparent and policy neutral. We strive to be a neutral statistical agency.

BY MS. MEYER:

Q And what does it mean for the information to be available on a timely and punctual basis?

MR. SVERDLOV: Objection. Vague and beyond the scope.

THE WITNESS: The Census Bureau has certain mandates to produce data by a certain time frame. So, for example, when it comes to the apportionment population counts, those data have to be delivered by December 31 of the census year. The Census Bureau has to produce the redistricting data by March 31st of 2021. The Census Bureau has to release American Community Survey year data every year in September. So there are a number of mandates that the Census Bureau must meet when it comes to producing data.

Q And if you look at the bottom of that column, at the second to last sentence that starts with "In order," it says, "In order to maintain credibility with data providers and users, as well as the public, federal statistical agencies and recognized statistical units must seek to avoid even the appearance that agency design, collection, processing, editing, compilation, storage, analysis, release and dissemination

processes may be manipulated."

What does that mean to the Census Bureau?

A Again, that means that we are focused on being a neutral statistical agency, and we are focuses on using the best practices and methods to achieve the data goals that we have.

Q And what does it mean to seek to avoid even the appearance that the process may be manipulated?

MR. SVERDLOV: Objection. Vague and beyond the scope.

THE WITNESS: To me, that speaks again to the fact that we are focused on making sure that our efforts are focused in statistical method and that we are a neutral agency and we focus on using the best practices as possible to achieve our data.

BY MS. MEYER:

Q And if you look at the same page, 71,615, "Responsibility 4, protect the trust of information providers by ensuring the confidentiality and exclusive statistical use of

their responses?"

What does this mean to the Census Bureau?

THE WITNESS: The Census Bureau must protect the confidentiality of the data that it collects; and when we publish information products, statistics, data products, we need to ensure that we are not publishing data that might lead to the identification of a respondent.

BY MS. MEYER:

Q And this includes with respect to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has to keep confidential all data that it collects in the decennial census, which contribute to the confidentiality -- to the apportionment count.

BY MS. MEYER:

Q And does this responsibility include a responsibility for data privacy?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you, please, repeat that?

BY MS. MEYER:

Q Does Responsibility 4 include a protection for data privacy?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: This speaks to the need to protect our data, privacy of respondents, keep the data they present to us, confidential, yes.

MR. SVERDLOV: Counsel, if I could have a moment, we've been going for about 70 minutes now. Maybe this would be a brief time to take a break.

VIDEOGRAPHER: Going off the record at 10:55 a.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 11:19 a.m.

MS. MEYER: Will the court reporter, please, mark this document as Exhibit 3?

(Exhibit 3, Update on Disclosure Avoidance and Administrative Data, was marked.)

MS. MEYER: Ms. Battle has been handed a document that the court reporter has marked as Exhibit 3, titled at the top "Statistical Policy

Directive Number 2, Standards of Guidelines for Statistical Surveys Addendum Standards and Guidelines for Cognitive Interviews."

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q Do you recognize this document?

A Yes.

Q Do these standards cover the Census Bureau?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau complies with Statistical Policy Directive Number 2.

BY MS. MEYER:

Q And what does the Census Bureau understand the purposes of Statistical Policy Directive Number 2 to be?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Statistical Policy Directive Number 2, the standards and guidelines for statistical surveys, again, provides

high-level guidance for federal statistical agencies, and they touch on many phases of the lifecycle of conducting a census or a survey.

BY MS. MEYER:

Q And does this statistical policy directive apply to the apportionment count?

MR. SVERDLOV: Objection. Vague. Calls for a legal conclusion.

THE WITNESS: The -- while this directive is titled Standards and Guidelines for Statistical Surveys, there are some elements of that that would apply to an actual census, not just a statistical survey.

BY MS. MEYER:

Q And what elements would apply?

A There are standards for planning. There are standards for data collection, preparation, testing of instruments. There are things along those lines that lead up to collecting the data that can apply also to a census.

MS. MEYER: Will the court reporter please mark this document as Exhibit 4?

(Exhibit 4, Statement of Commitment to Scientific Integrity, was marked.)

MS. MEYER: Ms. Battle has been handed a document marked by the court reporter as Exhibit 4 entitled "Statement of Commitment to Scientific Integrity by Principal Statistical Agencies that has been marked as Exhibit 4.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q And do you recognize this document?

A Yes.

Q Does this document cover the Census Bureau?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Yes.

BY MS. MEYER:

Q And what is this document's purpose to the Census Bureau?

MR. SVERDLOV: Objection. Misleading. Assumes facts not in evidence.

THE WITNESS: This document is the Statement of Commitment to Scientific Integrity, and it lists various statistical agencies that this applies to, and it talks about some of the core principles that statistical agencies adhere to.

BY MS. MEYER:

Q And does this document apply to the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: This document would apply to statistical agencies and their -- the data that they produce, so yes.

MS. MEYER: Will the court reporter please mark this document as Exhibit 5?

(Exhibit 5, Statement of Director of Census Bureau, was marked.)

MS. MEYER: Ms. Battle, has been handed a document that the court reporter has marked as Exhibit 5 entitled "Statement of the Director of the Bureau of Census John G. Keane," dated September 18, 1985.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q If you can turn, please, to Page 14. It's the last page of this document. If you can please look at the paragraph starting "In addition," and the second to last sentence says, that "The apportionment formula requires data of acceptable quality for all states."

Did I read that correctly?

A Yes.

Q What does that mean?

A This means to me that the Census Bureau has followed its statistical policy standards in collecting data from all states for the decennial census.

Q And to have data of acceptable quality for all states, not just a few, what does that mean?

MR. SVERDLOV: Objection. Asked and answered.

THE WITNESS: That the Census Bureau worked to apply all of its quality standards to all elements of data collection that took place in all the states.

BY MS. MEYER:

Q And why is it important to have acceptable quality of data for all states for the apportionment formula in particular?

MR. SVERDLOV: Objection. Misleading and compound.

THE WITNESS: Accurate data are needed for the apportionment population counts.

BY MS. MEYER:

Q What is the apportionment formula?

A The population -- the apportionment population counts that the Census Bureau produces are then utilized in the method of equal proportion formula which produces the number of seats to the in the U.S. House of Representatives assigned to each state.

Q So if you have unacceptable data quality for one state, does that affect the apportionment

formula?

MR. SVERDLOV: Objection. Vague. Misleading. Calls for speculation.

THE WITNESS: Could you, please, explain that more, what you --

BY MS. MEYER:

Q Let me rephrase.

A Okay.

Q Data in one state, the accuracy of that data, does that affect your apportionment formula?

MR. SVERDLOV: Same objection.

THE WITNESS: The Census Bureau works to produce accurate data so that we have accurate data for all states to use in the apportionment population counts that are then used in the method of equal proportion.

BY MS. MEYER:

Q Okay. And are there any other standards that we haven't discussed that the Census Bureau must adhere for the apportionment count?

MR. SVERDLOV: Objection. Vague. Calls for legal conclusion.

THE WITNESS: Standards in terms of data quality. The statistical quality standards provide that guidance for the decennial census and the current surveys and the data that's produced in those censuses and surveys.

BY MS. MEYER:

Q So other than the Statistical Directive Number 1, the Statistical Directive Number 2, are there any other standards?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Standards for the purpose of?

BY MS. MEYER:

Q For the apportionment count that the Census Bureau must adhere to.

MR. SVERDLOV: Objection. Vague and calls for legal conclusion.

THE WITNESS: In terms of the quality of the data, the statistical quality standards, Statistical Directive 1 and 2, all of those provide guidance to the Census Bureau.

MS. MEYER: Will the court reporter,

please, mark this document Exhibit 6?

(Exhibit 6, January 19, 2018 memorandum for Wilbur Ross from John Abowd, was marked.)

MS. MEYER: Ms. Battle has been handed a document that the court reporter has marked Exhibit 6. It's a January 19, 2018, memorandum for Wilbur Ross from John Abowd with the subject, Technical review of the Department of Justice request to add citizenship question to the 2020 census.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q Do you recognize this document?

A Yes.

Q And what is the general purpose of this document?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The general purpose of this document is for the Census Bureau to communicate

with the Secretary of Commerce on potential options for meeting the request for the Department of Justice for block-level citizenship data.

BY MS. MEYER:

Q And if I can direct your attention to the first paragraph of the memorandum, the first line of that paragraph reads: "The Department of Justice has requested block-level citizen voting age population estimates by OMB approved race and ethnicity categories from the 2020 census of population and housing."

Did I read that correctly?

A Yes.

Q What are block-level citizen voting age population estimates?

A Those estimates includes estimates of those who are 18 years and older, who are citizens, and that population is presented by race and ethnicity.

Q And is this known as CVAP data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The citizen voting age population estimate data reflects citizens of age 18 and older by race and ethnicity.

BY MS. MEYER:

Q And so the estimates referred to in the first sentence here, is that CVAP data?

A Currently CVAP data is produced at the block-group level from the American Community Survey, so this request is requesting for the same basic characteristics but just for a different level of geography down to the block level.

Q And the data in this CVAP data does not include data with respect to citizenships as for individuals that are younger than 18, correct?

MR. SVERDLOV: Objection. Compound.

THE WITNESS: Could you, please, repeat that?

BY MS. MEYER:

Q This CVAP data does not include data with respect to citizenship statistics for individuals that are younger than 18, correct?

A The CVAP data product that's being

developed produces data for those who are citizens age 18 and older.

Q And when you say "being developed," what do you mean?

A For the 2020 census, in order to comply with this request, the citizen voting age population data product is being developed.

Q And for that citizen voting age population product that is being developed, does the data include data with respect to noncitizens?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: The Census Bureau has put on its website the format for the 2020 citizen voting age population data product, and it includes estimates of the population who are age 18 and older who are citizens by race and ethnicity.

BY MS. MEYER:

Q So the format does not include data with respect to noncitizens; is that correct?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: The information on the

Census Bureau website does not include data for noncitizens.

BY MS. MEYER:

Q And does the format include data with respect to legal noncitizens?

A The format that's on the Census Bureau's website only includes information for those who are 18 years and older and a citizen by race and ethnicity.

Q So not legal noncitizens, correct?

A Correct.

Q And it does not include data with respect to undocumented residents, correct?

A The citizen voting age population format that's on the Census Bureau's website does not include information for those who are undocumented.

Q And if you look back at the first sentence I've been referring to on Exhibit 6, it says "block-level citizen voting age population estimates."

A Uh-huh.

Q Why is this characterized as an estimate?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Currently, the citizen voting age population data product that the Census Bureau publishes on an annual basis is based on sample data from the American Community Survey, so there are estimates there. The 2020 citizen voting age population data product, the methodology is being developed for that. What has been discussed with advisory committee members is that -- the idea that a statistical model would be utilized to produce those estimates.

BY MS. MEYER:

Q And prior to the Department of Justice request referred to in the first paragraph of this memorandum, had the Census Bureau produced CVAP data in the past?

A Yes.

Q And what was that data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The citizen voting age population data product that the Census Bureau has

produced in the past is based on the American Community Survey.

BY MS. MEYER:

Q When you say "based on," what do you mean?

A Uh-huh. That data from that survey are utilized to generate the data product.

Q And when does the Census Bureau produce that CVAP data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The citizen voting age population data that's based on the American Community Survey is released every year.

BY MS. MEYER:

Q And for how many years has it been released?

A The Census Bureau began producing this data product based on survey data in 2011.

Q And does the Census Bureau produce CVAP data in the P.L. 94-171 redistricting file?

A Would you repeat that, please?

Q Does the Census Bureau produce CVAP data

in the P.L. 94-171 redistricting file?

A The Census Bureau does not include citizenship data in the Public Law 94-171 redistricting data file.

Q So the only product that the Census Bureau currently produces CVAP data for is the ACS product we were discussing?

MR. SVERDLOV: Objection. Vague and misleading. Misstates prior testimony.

THE WITNESS: Could you repeat that, please?

BY MS. MEYER:

Q So the CVAP data that the Census Bureau currently produces, is that CVAP data the ACS -- based on the ACS data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The -- the citizenship voting age population data file that the Bureau currently produces is based on the American Community Survey.

BY MS. MEYER:

Q And it's only that one CVAP data file --

withdrawn.

That is the only CVAP data product that the Census Bureau currently produces as of now; is that right?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The citizenship voting age product is the only CVAP file that the Bureau produces at this time.

BY MS. MEYER:

Q How would the Department of Justice's request referred to in the first paragraph of this memorandum with respect to CVAP date differ from the CVAP data that the Census Bureau has produced in the past?

MR. SVERDLOV: Objection. Vague. Compound. Assumes facts not in evidence and misleading.

BY MS. MEYER:

Q The request in the first sentence of this document is for block-level citizen voting age population data. In the past, the Census Bureau, and currently, produces citizen voting age

population data to block group level, which is higher level of --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- of geography.

BY MS. MEYER:

Q So this request is asking for CVAP information at a higher level of geography, correct?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: This request is asking for citizen voting age population data by race and ethnicity at a lower level. They're requesting it at the block level, which is the level of geography that the Census Bureau produces data.

BY MS. MEYER:

Q And what was the Census Bureau's understanding of why the Justice Department was requesting this additional data product?

MR. SVERDLOV: Objection. Assumes facts not in evidence.

THE WITNESS: In the March 26, 2018, memo from Secretary Ross to the Census Bureau, that memo states that these data were asked in order to help the Justice Department enforce the Voting Rights Act.

BY MS. MEYER:

Q And does the Census Bureau have plans to produce this CVAP data product?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has stated that it plans to produce a citizen voting age population data product with data at the block level by March 31st of 2021.

BY MS. MEYER:

Q And in Paragraph 2 of Exhibit 6, Page 1, Mr. Abowd describes three alternatives in response to the Justice Department's request, correct? Correct?

A Yes.

Q And those alternatives are considered in the context of producing the specific CVAP data product that the Department of Justice was asking

for in the first paragraph; is that correct?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Yes.

BY MS. MEYER:

Q And looking at Alternative C in that second paragraph, the memo explains that Alternative C is obtaining citizenship status from administrative records for the whole 2020 census population, correct?

A Yes.

Q What does it mean to obtain citizenship status?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau is going to use administrative records to help determine the citizenship status for individuals.

BY MS. MEYER:

Q Is it fair to say that the goal of this CVAP data that the Justice Department had requested was to determine the citizenship status?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Could you please repeat that?

BY MS. MEYER:

Q Is it fair to say that the goal of this CVAP data that the Justice Department had requested in the first paragraph of this memorandum was to determine citizenship status?

MR. SVERDLOV: Same objection.

THE WITNESS: From the March 26, 2018 memo from the Secretary, that's where there was discussion about why these data were needed, so that's what I would have to defer to.

BY MS. MEYER:

Q What does it mean -- to determine citizenship status is to determine whether an individual is a citizen or a noncitizen; is that correct?

A The -- the goal would be to determine if an individual is a citizen or not a citizen.

Q Does a determination of whether an individual is a citizen or a noncitizen include a determination of whether a noncitizen is a legal

noncitizen?

MR. SVERDLOV: Objection. Vague. Misleading.

THE WITNESS: Could you, please, repeat that?

BY MS. MEYER:

Q In determining whether an individual is a citizen or a noncitizen, does that include a determination of whether a noncitizen is a legal noncitizen?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau is working to obtain administrative records that will have information on citizenship status. There will be some information that would provide information on whether someone is naturalized or whether someone is a lawful permanent resident, so that information will be utilized in determining if someone is a citizen or noncitizen for purposes of the citizen voting age population data product.

BY MS. MEYER:

Q Will there be a separate determination of

whether somebody is a legal noncitizen?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: When you say a "separate determination," can you clarify what you mean?

BY MS. MEYER:

Q So I understand Alternative C to be saying that there will be a determination made as to citizenship status from administrative records, correct?

A Uh-huh. Yes.

Q Will there be an additional determination as to the legal status of noncitizens?

A For the purposes of the citizen voting age population data file?

Q Correct.

A In order to publish those data?

Q Correct.

A The Census Bureau does not have any plans to put in the citizen voting age population data -- data on whether an individual is an undocumented immigrant.

Q What about a legal noncitizen?

A The Census Bureau, according to what's posted on our website, does not have plans to put into the citizen voting age population data product, data on those who are legal noncitizens.

Q And looking at Page 7 of this memorandum, so Exhibit 6, Page 7, under Alternative C, you see the subheading C1, "Policy of Administrative Record --

(Thereupon, the court reporter clarified.)

BY MS. MEYER:

Q -- versus Self-Report Citizenship Status" --

A Yes.

Q -- the second paragraph of that section starts with, "For all of these analyses we linked the Census Bureau's enhanced version of the SSA Numident data.

What is the SSA Numident data?

A The SSA Numident data is a data source from the Social Security Administration, and it's the numerical identification file which includes

data on all Social Security numbers issued.

Q So what information with respect to citizenship does the Numident contain?

A The Numident has a variable that indicates citizenship status.

Q What is that variable based on?

MR. SVERDLOV: Objection. Vague and beyond the scope.

THE WITNESS: It's based on data collected by the Social Security Administration.

BY MS. MEYER:

Q And is that data Social Security numbers?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Numident, SSA Numident contains information obtained from the application for a Social Security number.

MS. MEYER: Will the court reporter, please, mark this was Exhibit 7?

(Exhibit 7, Memorandum of Wilbur L. Ross from John Abowd, was marked.)

MS. MEYER: Ms. Battle has been handed a document marked by the court reporter as

Exhibit 7, dated March 1st, 2018, memorandum for Wilbur L. Ross from Mr. John M. Abowd regarding the subject -- doctor -- Dr. Abowd -- excuse me -- regarding the subject: "Preliminary Analysis of Alternative D, combined Alternatives B and C."

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q And do you recognize this document?

A Yes.

Q And what is its general purpose?

MR. SVERDLOV: Objection. Assumes facts not in evidence.

THE WITNESS: The purpose is to communicate from the Census Bureau to Secretary Ross the thoughts of the Census Bureau regarding Alternative D, which is the idea of merging together data on citizenship from the 2020 decennial census with administrative records for the purpose of developing a citizen voting age

population product.

BY MS. MEYER:

Q And the later part of Alternative D, using administrative records, is that the use of Alternative C in the previous memo?

A This particular memo blends the Alternative C with the Alternative D, yes.

Q If I can direct your attention to P39 of this document, if you look about halfway down the page, the document says there are citizenship data gaps in Alternative C.

What do "citizenship data gaps" mean?

A This means that relying on a Social Security Administration Numident data file there will be some holes in those data where we may not be able to use that to help us determine an individual's citizenship status.

Q And are there types of individuals that will have these citizenship data gaps?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Yes. The document lays out

a number of those categories for us.
BY MS. MEYER:
Q And have those categories changed since the time that this memo was issued?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: I am not aware of these categories changing.
BY MS. MEYER:
Q Have the gaps in citizenship data for these categories changed?
MR. SVERDLOV: Objection. Vague and misleading.
THE WITNESS: Let me review these categories.
BY MS. MEYER:
Q Of course.
A The Census Bureau is working to obtain additional administrative records to assess if some of them might be able to help us fill some of these data gaps.
Q And you say "some of these data gaps," which of the data gaps listed here?

MR. SVERDLOV: Objection. Because the methodology, as the witness has testified, is under development, specific questions concerning which data gaps the agency might be able to fill would be protected by the deliberative process privilege, and for that reason I will instruct the witness to answer in general terms if she can.

THE WITNESS: So, for example, Category Number 5 where it talks about lawful permanent residents who received that status prior to 2001 and either do not have a Social Security number or applied for a Social Security number prior to when citizenship verification was required for those born outside the U.S.

So the Census Bureau is working to obtain data that may help us understand if an individual is in the Social Security Administration's Numident file as a noncitizen, and they have become naturalized but that information was not reported to the Social Security Administration. Then we know that citizen is a naturalized citizen, but it's not reflected in Social Security

Administration data. So obtaining additional administrative records might be able to help us with that, for example.

BY MS. MEYER:

Q With respect to Numident overall, what percentage of the Numident records have missing citizenship status?

MR. SVERDLOV: Objection. Vague, misleading and foundation.

THE WITNESS: I do not recall that off the top of my head.

BY MS. MEYER:

Q Where would we go to get that information?

A The -- I believe there's a paper by Michael Bernie, et al., as well as the David Brown, et al., paper, that may have a chart that provides that information.

MS. MEYER: Will the court reporter please mark this document as Exhibit 8?

(Exhibit 8, Understanding the Quality of Alternative Citizenship Data Sources for the 2020

Census, by J. David Brown, et al., dated August 2018, was marked.)

MS. MEYER: Ms. Battle has been handed a document that the court reporter has marked as Exhibit 8 entitled, "Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census," by J. David Brown, et al., dated August 2018.

BY MS. MEYER:

Q Do you have this document in front of you, Ms. Battle?

A Yes.

Q And do you recognize this document?

A Yes.

Q Was this the document you were referring to in your previous answer?

A Yes. This is the David Brown, et al., paper.

Q If we can turn to Page 15 of the document, the first full paragraph reads: "Approximately 20.9 percent or 57.6 million of the 2010 Numident records have missing citizenship

status," correct?

A Yes.

Q And that's with respect to the 2010 Numident file, correct?

A Yes.

Q Is that the most recent Numident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau obtains a quarterly update on the Numident, so that would not be the most recent Numident that the Census Bureau has access to.

BY MS. MEYER:

Q Is there any reason to expect Brown's estimate for the missing records in the 2010 Numident file to have changed for these updated Numident files?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau would need to analyze the data to make that type of determination.

BY MS. MEYER:

Q And when you say "analyze the data," what

data do you mean?

A The Census Bureau would look at a current version of the Numident and assess what proportion of the records in that file were missing citizenship status.

Q Are there any major changes that the Census Bureau is aware of from the time that Mr. Brown got his estimate of 20.9 percent to now that could change the percentage?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I think that part of the reason the Census Bureau has reached out to other federal agencies is to help us understand if there are individuals out there who were noncitizens who have become naturalized citizen but they're not reflected in the Numident. We want to research a way to join those data together to make sure we have the most current information on citizenship status for individuals.

BY MS. MEYER:

Q And when you say "join those data together" --

A Uh-huh.

Q -- do you mean using that data to change the actual Numident data?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: What I mean is that the idea would be to link together data from other federal agencies that may have a more up-to-date or current information on an individual's citizenship, link that if possible with data in the Numident so we can assess if we do indeed have the most recent or current information. It may be that the Numident information has not been updated in a while, but there's more current data out there that can be used.

BY MS. MEYER:

Q Do you know if that current data would be used to update the Numident?

MR. SVERDLOV: Objection. Vague and misleading. And because this line of question again bears on the methodology that the Census Bureau is currently developing, I will instruct the witness to answer in a general way so

as to preserve the deliberative process privilege.

THE WITNESS: My understanding is that the goal is to pool together different sources of citizenship status for individuals and use that information from multiple sources to help determine an individual's citizenship status.

BY MS. MEYER:

Q If you look on the following page of Exhibit 8, Page 16, are missing data rates higher for some groups than others in the Numident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Missing data? Do you mean specifically citizenship is missing?

BY MS. MEYER:

Q Correct.

A I am not aware of any further analysis that may try to break down subpopulations and their specific missing rates.

Q But is it fair to say that missing data in the Numident is higher for some groups than others?

MR. SVERDLOV: Objection. Vague and

misleading.

THE WITNESS: In terms of citizenship being missed and in terms of what's presented in Table 3, we see that citizenship status is missing for, you know, 42,460,000 individuals who are U.S. born, which is more than those that are foreign born.

BY MS. MEYER:

Q And the bottom paragraph of that Page 16, second to last sentence says the missing data rates are higher for administrative records than the ACS and both sources rates are higher for minorities than nonrelatives.

A Uh-huh.

Q What does the "missing data rates" mean?

A In this paragraph, they are talking about citizenship data, so they're referring to missing data rates in terms of citizenship.

Q And it says they're higher for minorities than nonrelatives, correct?

A Uh-huh.

Q Is there any reason to think that would

have changed?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: We would have to take a look at current analyses to see if that has changed or not?

BY MS. MEYER:

Q Are there any other groups of people where the missing data rates would be higher?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: You would have to defer to the analyses that are in this paper until further analyses are done.

BY MS. MEYER:

Q Has there been any further analysis along these lines done by the Census Bureau?

A The paper that we have here lays out the specific analyses that have been done. I am not aware of any additional analysis done specifically along these lines that's in the paper.

Q So this is the most current information we have with respect to this?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: I am not aware of any additional updated analyses.

BY MS. MEYER:

Q Does the Census Bureau have plans to do additional analyses?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau is going to be evaluating the administrative records that we've acquired from other federal agencies and so there will be additional analyses, but specifically what types of analyses, I don't know.

BY MS. MEYER:

Q With respect to the Numident file in particular and those data gaps, do they have plans for additional analyses?

MR. SVERDLOV: Objection. Vague.

And because this line of question goes into the ongoing work in this area, I'll instruct the witness to answer only in general terms to protect the deliberative process.

THE WITNESS: I know the Census Bureau is planning evaluation and analyses, but I do not know the specific nature of those.

BY MS. MEYER:

Q So we've talked about missing citizenship data from the Numident. What about can there be inconsistent citizenship data in the Numident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has noted in this paper that there are some discrepancies when comparing the records that Numident has versus self-reported data by survey respondents.

BY MS. MEYER:

Q Any other inconsistencies?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not aware of other inconsistencies, but there may very well be.

BY MS. MEYER:

Q And where would we go to find out what those other inconsistencies might be?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: That will come from

additional evaluations and analyses of the administrative records.

BY MS. MEYER:

Q But there's no analyses as of now to additional inconsistencies between the Numident and other citizenship data?

MR. SVERDLOV: Objection. I'll direct the witness not to answer because this gets into the deliberative process privilege.

MS. MEYER: I'm just asking about the fact. If there's a fact -- if as a factual matter there are other analyses that talk about the inconsistencies that exist now.

MR. SVERDLOV: I think that as the question was phrased that whether they were public analyses, the witness might be able to answer. But the nature of the analyses and by extension the kinds of analyses that are ongoing is protected by the deliberative process privilege.

BY MS. MEYER:

Q Are there other publically available analyses of the inconsistencies between the

Numident and other citizenship data?

A The David Brown paper and the Michael Berning memo talk about these discrepancies between administrative records and self-reported information on citizenship. And the David Brown paper largely draws from that Michael Berning paper.

Q If we can go back to Exhibit 7, if you can turn to Page 40, you referenced Number 5 at the top before, correct?

A Yes.

Q At the -- the second to the last sentence of that Number 5, it says, "The former group will not be found in PVS," and that former group is referring to lawful permanent residents who received that status prior to 2001 and either do not have a Social Security number or applied for a Social Security number prior to when citizenship verification was required for those born outside the U.S.; is that correct?

A Yes.

Q What does it mean this group will not be

found in PVS?

A So the Census Bureau has a person verification system called the "PVS," which is utilized to link individuals' records across censuses, surveys and administrative records, and the way this process works is that when we have newly-acquired datasets or newly-acquired data files that come in, we search for individuals in this new data in our reference files, which are the basis of this PVS.

And so, typically, Social Security numbers is one way that is -- is one part of the sequence that's used to try to identify and make these linkages. So if people do not have a Social Security number, then you may not be able to find them in your reference files.

Q Okay. And it says the latter group has been --

(Thereupon, the court reporter clarified.)

MS. MEYER: -- the latter group has inaccurate data in this Numident.

BY MS. MEYER:

Q What does that mean?

A Well, this is the situation where an individual may have been a noncitizen when they first applied for a Social Security number, which would have been in the 1970s or prior, and that individual over time may have become a naturalized citizen, but that information was not reported to the Social Security Administration. So the information that the Social Security administration has on their citizenship would be inaccurate. It's not up-to-date.

Q So does that mean that those individuals are not in PVS as well?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Those individuals may be in the PVS, because if they had some type of Social Security number, even if it came from the early -- you know, before 1972, then that number may be available in your reference files and we may be able to find them that way.

BY MS. MEYER:

Q So just so I'm clear: What is the inaccurate data in the Numident?

A The inaccurate data would be the citizenship status. It would be out of date if an individual had become naturalized over time but did not report that to the Social Security Administration.

Q So how would that inaccurate data in that example show up in the Numident?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: That individual would show up as a noncitizen.

BY MS. MEYER:

Q Even though they are a citizen?

A That is correct.

Q Looking at Page 30 -- 38 of the memo, the second to last paragraph, the second question about the Numident citizenship variable is how complete and timely its updates are for naturalizations.

How does that affect data in this Numident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: So as we were discussing, it's possible for those who have a Social Security number, who when they obtained that Social Security number were not citizens, and that's the information that the Numident contains. But if that individual at some point in time later became a naturalized citizen and did not report that to the Social Security Administration, then we would have an out-of-date citizenship status in the Numident for that individual.

BY MS. MEYER:

Q Okay. And going back to Page 40 where there's some categories, Category Number 6 says, "Noncitizen, non-LPR residents who do not have an SSN or ITIN and who did not apply for a visa extension, these persons will not be found in PVS," correct?

A Yes.

Q And what types of individuals are in this

category?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The descriptors, I would rely on the descriptors in the texts. They are noncitizens. They are not lawful permanent residents; they do not have a Social Security number or an individual taxpayer identification number; and they did not apply for visa extension.

BY MS. MEYER:

Q So this would include undocumented residents to which we have been referring to?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Yes.

BY MS. MEYER:

Q So for persons in this category, at the time this memo was issued, there was no information that the Census Bureau had access to residents with respect to their citizenship; is that right?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Could you repeat that for me?

BY MS. MEYER:

Q So if these persons are not in PVS, that means they don't have a Social Security number or an ITIN; is that right?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: For the description listed here, these individuals would not be in the PVS.

BY MS. MEYER:

Q Would not be in PVS?

A Uh-huh.

Q So does that mean the Census Bureau has information with respect to citizenship data for these individuals?

MR. SVERDLOV: Objection. Vague and argumentative.

THE WITNESS: The Census Bureau has recently acquired additional administrative records, and there's -- we're still waiting, I believe, for one more data source to come through. And the Census Bureau will need to analyze,

assess, evaluate these data to determine if there's any information there that could be helpful in determining citizenship.

BY MS. MEYER:

Q In the next paragraph under the subheading --

(Thereupon, the court reporter clarified.)

BY MS. MEYER:

Q In the next paragraph, in the -- it says, "Can survey data address the gaps in Alternative C --

A Uh-huh.

Q -- in that paragraph, about halfway through it says, "A significant but unknown fraction of persons without PIKs are in Category 6?"

What is a PIK?

A I need to find the spot where you were reading.

Q I'm sorry.

A To make sure what that is.

Q So right under the subheading "Can survey data," and then in that first paragraph under the subheading --

A Uh-huh.

Q -- about the third sentence in --

A Uh-huh.

Q -- it starts, "A significant but unknown fraction of persons without PIKs are in Category 6."

What is a PIK?

A A PIK is a protected identification key. It's a unique identifier that does not contain any personal information, but it's a unique identifier that's attached to records that we have that facilitate the linkage from one dataset to another.

Q And if you continue reading in that paragraph it says, "Distinguishing these people from the other categories of persons without PIKs is an inexact science because there is no feasible method of independently verifying their noncitizen status," correct?

A Yes. That's what it says, yes.

Q And why is this fraction of persons without PIKs unknown?

A Because there may be other individuals who we are not able to assign PIKs to who may be citizen. They may be lawful permanent residents. They -- so it's not only those who are noncitizen, non-LPR, who do not have a Social Security number, ITIN that we cannot assign PIKs to.

Q And do you know the number of persons without PIKs in that Category 6?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not aware of a number of people who fall into that category.

BY MS. MEYER:

Q Does the Census Bureau know that number?

MR. SVERDLOV: Objection. I need to clarify something.

I have been proceeding under the assumption about the witness's knowledge pertains to the knowledge of the Census Bureau.

MS. MEYER: Correct. I am as well.

MR. SVERDLOV: Okay. The second question made me think that you were drawing a distinction between the two.

THE WITNESS: I don't mean to draw that distinction. But thank you for clarifying.

BY MS. MEYER:

Q When I refer to you I am referring to the Census Bureau, so to be clear: The Census Bureau is not aware of how many individuals are in Category Number 6?

A At this time, the Census Bureau is not aware of how many people are in this category currently.

Q Why is there no feasible method of independently verifying noncitizen's status for those in Category Number 6?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: The basic idea is that when you have a PIK assigned, that allows you to link records -- so, for example, a record from the decennial census or some other data source to the Numident -- and that would be an avenue to assess

the citizenship variable, the value of that citizenship variable. But if we're not able to make that linkage, then we are not able to compare to sources of citizenship to verify.

BY MS. MEYER:

Q When you say "assess the citizenship variable," what do you mean?

A Well, the idea is to link records so that we can see what information we have on citizenship in the Numident, for example, or in our reference files; and if you can't make that linkage, then you're not able to compare information for an individual and see what information has been provided regarding citizenship.

Q And how does that information -- how does that comparison help you?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Well, in the example of what we discussed earlier is -- again, if the Numident has information that maybe is outdated, if there are other administrative records that may

have a more up-to-date or current source of citizenship data and those records can be linked together, you can then compare. We have citizenship data in the Numident that's as of a certain date and then you have information on citizenship from other administrative records that may be as of a certain date, we can look and see which information is more current and more up-to-date.

BY MS. MEYER:

Q And why would you look to see what information is more current?

A Well, the Census Bureau has identified that there are some data gaps with utilizing the Numident, the Social Security Administration data, so the goal is to acquire other administrative records and evaluate them and assess them and see if that information can be useful in helping us determine citizenship status.

Q And why does the Census Bureau use the Numident for the basis of that comparison?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Numident is -- as noted in these documents is our best, most reliable data source on citizenship because it has data on every Social Security number ever issued, and in the variables that are available in the Numident, citizenship status is one of those variables.

BY MS. MEYER:

Q So if somebody doesn't have information in this Numident, could they have information in the other administrative records?

MR. SVERDLOV: Objection. Calls for speculation.

THE WITNESS: That's why the Census Bureau has acquired these new datasets, so we can evaluate that.

BY MS. MEYER:

Q So is it possible that somebody would have information in the administrative records but not in the Numident?

MR. SVERDLOV: Same objection.

THE WITNESS: Yes. That's possible.

BY MS. MEYER:

Q And in that instance, if the person is not in this Numident --

A Uh-huh.

Q -- are you comparing information -- what information are you comparing with respect to that person?

MR. SVERDLOV: Objection. Vague.

And because this pertains -- this line of questioning pertains to ongoing methodological development at the Census Bureau, I will direct the witness to answer only in general terms, if she can, to protect the deliberative process privilege.

THE WITNESS: Again, that is really a part of the evaluation that's going on. We have our Numident. The idea is to collect additional administrative records to evaluate and to assess, so all of that work has to be developed and conducted.

MR. SVERDLOV: Counsel, we've been going for another hour. I don't know. Can we take another --

MS. MEYER: We can take a break. This is actually a fine time to break for lunch.

VIDEOGRAPHER: We're going off the record. The time is 12:27 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 1:26 p.m.

MS. MEYER: Will the court reporter please mark this exhibit as -- as Exhibit Number 9?

(Exhibit 9, Document entitled, "Executive Order 13880," was marked.)

MS. MEYER: Ms. Battle has been handed a document that the court reporter has marked Exhibit 9. It's entitled, "Executive Order 13880" of July 11, 2019.

BY MS. MEYER:

Q Ms. Battle, do you have this document in front of you?

A Yes.

Q And do you recognize this document?

A Yes.

Q What is the Census Bureau's understanding of what the president is requesting in this order?

MR. SVERDLOV: Objection. Foundation.

THE WITNESS: The executive order is calling for the development of the number of citizens, noncitizens and the undocumented immigrant population. The executive order specifically states that the Secretary of Commerce should instruct the Census Bureau director to establish an interagency working group with the purpose of facilitating the acquisition of administrative records with the goal of determining citizenship for 100 percent of the population.

BY MS. MEYER:

Q And what does it mean to determine citizenship for 100 percent of the population?

A The interpretation of that is that the executive order is calling for the count of the number of citizens and noncitizens in the country.

Q And does that count include the number of undocumented immigrants?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The executive order calls for the development of the number of citizens, noncitizens and the undocumented immigrant population.

BY MS. MEYER:

Q If you look at the first page of the order, last paragraph, a couple of sentences in starting with "Secretary of Commerce" --

A Could you repeat where you're --

Q Yeah. The last paragraph of the first page, starting "When the Secretary of Commerce."

A Got it.

Q So it states: "When the Secretary of Commerce decided to include the citizenship question on the census, such a question in combination with the administrative records would provide the most accurate and complete data. At the time, the Census Bureau had determined based on experience that administrative records to which it had access would enable it to determine citizenship status for approximately 90 percent of

the population."

Did I read that correctly?

A Yes.

Q And by determine citizenship status for approximately 90 percent of the population, what does "determine citizenship status" mean?

MR. SVERDLOV: Objection. Vague and beyond the scope of this deposition.

THE WITNESS: To identify or determine whether that individual was a citizenship -- citizen or not a citizen based on data available.

BY MS. MEYER:

Q And that determination -- does that determination include any determination with respect to legal status?

A This text refers to determining citizenship status, citizen or noncitizen.

Q So not legal status, correct?

MR. SVERDLOV: Objection. Argumentative.

THE WITNESS: This text does not.

(Thereupon, the court reporter clarified.)

THE WITNESS: This text that we are focusing on here does not reference the undocumented immigrant population.

BY MS. MEYER:

Q So at this time that the text is referring to when a determination had been made that approximately 90 percent of the population had a relationship with citizenship status, was there a determination made with respect to legal status?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: This statement is referring to work that's in the documents that we looked at where they were determining citizen or noncitizen. That was the citizenship status that they were determining.

BY MS. MEYER:

Q So not legal status, correct?

MR. SVERDLOV: Objection. Argumentative.

THE WITNESS: Not legal status.

BY MS. MEYER:

Q And if I can direct your attention to Page 33,825 of that document -- the pages are at the top -- you earlier testified about an interagency working group.

Does Section B establish that interagency working group?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: This section discusses the Secretary of Commerce instructing the director of the Census Bureau to establish an interagency working group.

BY MS. MEYER:

Q And what is that interagency working group charged with?

A The interagency working group is charged with working together to facilitate the Census Bureau's acquisition of administrative records that can be used to establish citizenship status for 100 percent of the population.

Q Does this include legal status?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: This section of the executive order, this particular text, does not reference legal status.

BY MS. MEYER:

Q So is the interagency working group charged with determining legal status?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: This executive order states that the purpose is to maximize the availability of administration records in connection with the census with the goal of obtaining administrative records that could help establish citizenship status for 100 percent of the population.

BY MS. MEYER:

Q And who is a part of the interagency working group?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The interagency working group has a number of members. That information is on a reference sheet.

BY MS. MEYER:

Q Was it previously marked as an exhibit in the last deposition as Background Number 2?

A Yes.

Q So that's the same interagency working group as the executive order refers to?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Those are -- the Reference Sheet Number 2 lists the numbers of the interagency working group that the Department of Commerce instructed the director of the Census Bureau to establish.

BY MS. MEYER:

Q And who does the working group report to?

MR. SVERDLOV: Objection. Assumes facts not in evidence.

THE WITNESS: The chair of the working group is the director of the Census Bureau.

BY MS. MEYER:

Q And how are decisions made?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm -- I'm not sure -- decisions regarding?

BY MS. MEYER:

Q Regarding the tasks that the interagency working group is charged with, how are decisions made?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: The Census Bureau had a meeting with the interagency working group and laid out the high-level milestone schedule and, again, sought to encourage the facilitation of administrative records listed in the executive order, as well as there may be other administrative records that might be helpful in the census meeting its goal of establishing citizenship for 100 percent of the population.

BY MS. MEYER:

Q And what are those high-level milestones?

A The interagency working group is told that the first milestone was that we need memorandums of understanding, agreements that govern the Census Bureau's acquisition of data. The request was for all of those agreements to be

signed and approved by the end of November of 2019.

The next milestone was for the first delivery of data to come from the federal agencies by -- in December of 2019.

The next milestone for the working group was to have a second delivery of data where the data were current as of April 1st, 2020, and that second delivery was to take place in -- by July of 2020.

Q And after the delivery, are there any other milestones?

A The main milestone was then to release the citizen voting age population data file by March 31 of 2021.

Q And which milestones have -- has the interagency working group met?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has another reference sheet. Actually, the Reference Sheet Number 2 lists the different administrative records that have been requested from the

different federal agencies and lists which ones are -- we've received the data, they are complete. And it also lists the one I believe that's outstanding, that we have not received yet.

BY MS. MEYER:

Q And you said that there was a milestone to release the CVAP data by March 31, 2021, correct?

A Yes.

Q Are there any other milestones with respect to the release of data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: In terms of the release of the citizen voting age population, that milestone has been established as March 21, 2021 at the latest.

BY MS. MEYER:

Q And are there other milestones related to their release of data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not sure what data you mean.

BY MS. MEYER:

Q Is there any data other than the CVAP data that the Census Bureau plans to release as part of this interagency working group?

A I am not aware of any other milestones for other data that would be based on information from this interagency working group.

Q Is it fair to say that this CVAP data would be a type of deliverable for this interagency working group?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: No. I would not say that the CVAP data is a deliverable of the working group. The working group is really established in order to facilitate the Bureau acquiring administrative records and then the Census Bureau will use those data after they've been evaluated and assessed and methods have been finalized to then produce a citizen voting age population data file, which is a Census Bureau deliverable product.

BY MS. MEYER:

Q Are there milestones for when the interagency working group needs to evaluate data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The -- it's really the Census Bureau that's taking the lead on evaluating the data that we receive from these federal agencies. The Census Bureau has stated publically that its goal was to evaluate and analyze these newly-acquired administrative record datasets by the Spring of 2020.

BY MS. MEYER:

Q And is there a specific month in the Spring of 2020 that you plan -- that the Census Bureau plans to evaluate these new records by?

A The evaluation and analyses are ongoing. And as I mentioned earlier, we're still waiting for delivery of, I believe, at least one source of data.

Q And where is that source of data from?

A The reference sheet provides that information.

Q We'll get to that in a minute.

When the Census Bureau receives new data, in general, does the Census Bureau go through a process of evaluating that data for fitness of use?

MR. SVERDLOV: Objection. Vague and assumes facts not in evidence.

THE WITNESS: The Census Bureau, when it receives newly-acquired data, does have to conduct an evaluation and assess those data.

BY MS. MEYER:

Q And is the purpose of that, that data will be used for a part of that evaluation?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Depending on the intended use of those administrative records, that will guide the type of evaluation and analyses that is conducted.

BY MS. MEYER:

Q And how long does this evaluation usually take?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: It really depends on the data source and the intended purpose. It can vary.

BY MS. MEYER:

Q So you testified that the length of time can vary. What's the shortest amount of time --

MR. SVERDLOV: Objection --

BY MS. MEYER:

Q -- that an evaluation would take place?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I do not have that information.

BY MS. MEYER:

Q Can you provide some type of estimate of what might be the shortest time?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I don't have a shortest time estimate.

BY MS. MEYER:

Q What are the typical things that happen in an evaluation of data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau, when it first receives newly-acquired data needs to make sure that, first of all, that the data file can be read into our systems and that the data file contains all the information that was listed in the memorandum of understanding. The Census Bureau then will need to -- depending on the purpose of acquiring those data, will evaluate all of the variables and assess how they can be used for whatever the intended purpose is.

BY MS. MEYER:

Q And who's involved in that process?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: It depends on the individuals who have requested the newly-acquired data. There is a data acquisition group where they focus on taking a first look at the data that are obtained, again making sure we can read the data into our systems and making sure that the variables reflect what was in the memorandum of understanding.

Beyond that, the groups that further analyze the data would be those who have requested that information for whatever their research or data product purpose is.

BY MS. MEYER:

Q And if the data variables do not reflect what is in the memorandum of understanding, what happens then?

A The Census Bureau would then reach out to the point of contact at the sending federal agency and discuss.

Q Would they ask for additional data?

MR. SVERDLOV: Objection. Calls for speculation.

THE WITNESS: They would work to understand why the Census Bureau received the data that did not include the information as expected in the memorandum of understanding.

BY MS. MEYER:

Q And when an evaluation like this takes place, does the Census Bureau record its evaluation anywhere?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: It depends on the nature and purposes of acquiring those data.

BY MS. MEYER:

Q So sometimes the evaluation will be recorded?

A I can just say it depends on the nature of what those data were utilized for. They may be the primary focus on a research project or they may contribute in a limited way. So it really just depends on the purpose of these data and what their intended use might be.

Q If it's the primary focus, is it more likely that they are going to be recorded somewhere, the evaluation?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: Can you repeat that again, please.

BY MS. MEYER:

Q If the -- the evaluation relates to the primary focus of the purpose of getting the data,

is it more likely that the results of the evaluation of that data would be recorded somewhere?

MR. SVERDLOV: Same objection.

THE WITNESS: Again, I think it depends on the nature of the data, what they're required for.

MS. MEYER: Will the court reporter please mark this was Exhibit Number 9 -- 10?

(Exhibit 10, Memorandum of Agreement Between the United States Department of Commerce, the U.S. Census Bureau and United States Department of Homeland Security, was marked.)

MS. MEYER: Ms. Battle, has been handed a document titled, "Memorandum of Agreement Between the United States Department of Commerce, the U.S. Census Bureau and United States Department of Homeland Security Regarding the Transfer of Immigration and Citizenship-related Data."

BY MS. MEYER:

Q Ms. Battle, do you recognize this document?

A Yes.

Q And what is the purpose of this document?

MR. SVERDLOV: Objection. Vague. Assumes facts not in evidence.

THE WITNESS: This document captures the agreement between the Department of Commerce and the Census Bureau and the Department of Homeland Security for the Census Bureau to acquire administrative records.

BY MS. MEYER:

Q So when we've been talking about memorandums of understanding, is this an example of a memorandum of understanding?

A Yes.

Q And was this document created pursuant to the executive order?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The reference sheet will determine the exact dates when negotiations began, but this document, the MOU, states that this MOU -- MOA, excuse me -- establishes an agreement between Census and the Department of

Homeland Security to assist the Census Bureau in determining the number of citizens, noncitizens and illegal aliens pursuant to the executive order.

BY MS. MEYER:

Q Okay. And the second paragraph, third sentence in, it says, "The Census Bureau, we use data to provide new estimates of population characteristics related to citizenship for the purpose of executing the mandates set forth in EO13880."

What does it mean "new estimates of population characteristics related to citizenship"?

A This refers to the Census Bureau's efforts to use administrative records to help it determine citizenship status for the citizen voting age population data product.

Q Are there other population characteristics that the Census Bureau estimates?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you repeat that,

please?
BY MS. MEYER:
Q Are there other population characteristics, besides the one that's mentioned here, that the Census Bureau estimates?
MR. SVERDLOV: Same objection.
THE WITNESS: The Census Bureau produces estimates for many characteristics for many data sources, for many data products, so --
BY MS. MEYER:
Q Can you give a few examples of what some of those other characteristics are that the Census Bureau estimates?
A The Census Bureau produces population estimates annually where we estimate age, sex, race and Hispanic origin, population for the nation, for states, for counties at that level. The Census Bureau produces American Community Survey estimates.
So there are many data sources and data products that the census produces that are estimates.

Q Are there any estimates that are used for the apportionment count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The apportionment count is based on the decennial census, resident population from -- and the Federally Affiliated Count Overseas, so those are not estimates.

BY MS. MEYER:

Q If I can direct your attention to Attachment 1 of this document, Exhibit 10, Page 17 --

A Uh-huh.

Q So Attachment 1 says, "Description of Approved Research Project."

What is an approved research project?

A When the Census Bureau want to utilize administration records that have been acquired from other federal agencies, they must have a documented purpose or project for which those data will be used, and this is one project that will utilize administrative records from the Department of Homeland Security and other sources.

Q And is -- does this attachment -- does the Attachment 1 reflect the Census Bureau's current understanding of its approved research project to use administrative records to support the executive order?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: This Attachment 1 speaks to the project that the Census Bureau is undertaking to utilize administrative records to help it produce the citizen voting age population statistics.

BY MS. MEYER:

Q Are there any other approved reference projects to use administrative records to support the executive order?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not aware of any other research projects at this time that have been put into place to support the executive order.

BY MS. MEYER:

Q If we can look at the last sentence of

the first paragraph --

A Uh-huh.

Q -- of this attachment, it says, "The objective of the project is to determine the number of citizen and noncitizens in the country," correct?

A Yes.

Q Does this objective include a determination of the legal status of noncitizens?

A The objective stated in the attachment does not refer to the undocumented immigrant population.

Q Does the Census Bureau currently have any plans to determine the legal status of noncitizens?

A The Census Bureau is working to comply with the executive order. The executive order calls for the number of citizen, noncitizens and the undocumented immigrant population.

Q Is the number of the undocumented immigrant population reflected in this Attachment 1?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The objective of this Attachment 1, the research project, does not refer to the undocumented immigrant population.

BY MS. MEYER:

Q The first sentence of this attachment reads: "The Census Bureau plans to use several administrative data sources of citizenship status in a statistical model that will produce a probability of being a U.S. citizen on April 1, 2020, for each person in the 2020 census," correct?

A Yes.

Q Are there key administrative data sources that the census plans to use for this purpose?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau --

MR. CANNON: Counsel, one moment.

Folks on the phone, could you please go mute, please. Please put your speakers on mute. Thank you very much.

THE WITNESS: Could you, please, repeat

your question?

BY MS. MEYER:

Q Are there key administrative data sources that the Census Bureau plans to use for this purpose?

A The Census Bureau has recently acquired new data, new administrative records from a federal agency. We still have at least one more agency to deliver data. The Bureau will evaluate and analyze those data, and at that time, the Bureau will, then, determine which particular administrative records would be of use for this particular project, which would be developing the citizen voting age population data product.

Q And do those data sources include the Numident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Numident is one source of data, yes.

BY MS. MEYER:

Q And this first sentence refers to a statistical model. Has the Census Bureau used

statistical models in the apportionment count previously?

MR. SVERDLOV: Objection. Vague and misleading. Misstates prior testimony. Assumes facts not in evidence.

THE WITNESS: Well, as we discussed earlier, there are statistical models used in the nonresponse follow-up operation, and so in that sense data are utilized -- statistical models are utilized to help the Census Bureau in its effort to collect and conduct the census, and those data contribute to the apportionment population counts.

BY MS. MEYER:

Q Is -- is hot-deck imputation an example of that?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Hot-deck imputation can be viewed as a form of statistical model.

BY MS. MEYER:

Q And what is hot-deck imputation?

A This is a technique that's utilized to help the Census Bureau in the case of

characteristics which we know are missing; for example, age is missing or race is missing.

The Census Bureau goes through a number of efforts to try to fill in that missing information, and one of those efforts could be using a hot-deck methodology where you are basically trying to match up a household that is missing characteristics with another household that has some similar characteristics, maybe the same number of people in that household, and then you can borrow data from the donors in that other household, the nearest neighbor concept, and help you fill in missing information.

Q And that information with respect to the donors and other households, where does that information come from?

A Households that have provided responses to the decennial census, those data are -- are stored in -- and for use in a hot-deck methodology. So the data are from reported information from others participating in the census.

Q Are there statistical models that use data that are not from the decennial census?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: As we mentioned earlier about the nonresponse follow-up operation where statistical models are utilized to determine if a housing unit nonexistent, vacant or occupied, the Bureau will be using administrative records, data from the Postal Service or data from the IRS.

So there are data sources like that, that have gone into some of those models for the Census Bureau's operational purposes.

BY MS. MEYER:

Q And then those data sources are used to fill in missing information; is that right?

A Well, in the context of missing characteristics?

So, again, if age is missing or race is missing, the idea would be to take information and then use that from other sources to fill in missing information. It could be from administrative records. It could be from a

nearest neighbors. It could be from others within the same household that provided information. So there's a series of steps the Bureau goes through to fill in missing information.

Q Here it mentions that this statistical model --

And by "here" I mean in Attachment 1, the first sentence.

A Uh-huh.

Q -- that it will produce a probability.

A Uh-huh.

Q What is "a probability" in this context?

A "A probability" is just a mathematical expression of the odds of an individual being a U.S. citizen.

Q What -- what about -- sorry.

What do those odds look like? Can you give me an example of what an odd might look like in this context?

A It could be .5. It could be .3. It could be zero. It could be one. The value range for the probability goes from zero to one.

Q And when we were talking about imputing information before in the context of characteristics, is the Census Bureau getting a probability for that?

MR. SVERDLOV: Objection. Vague and leading.

THE WITNESS: No. When it comes to imputing missing characteristics, the Census Bureau is actually taking the imported information and utilizing that to fill in the missing record. So if the Census Bureau has -- here's an example: If there's a household where there's a child who does not have his race information or her information reported, but the biological parent in the household does, the Census Bureau, in its sequence of steps that they take in an effort to fill in that missing information, may look to see, hey, can we take the race of that biological parent and impute that to the child?

So they're not probabilities. We're taking actual responses and assigning them to an

individual.
BY MS. MEYER:
Q Has the Census Bureau used statistical models to produce probabilities previously?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: The -- when we talked about the nonresponse follow-up operation, the statistical models that are utilized to determine if an address is vacant, occupied or in existence, that model produces probabilities that that particular address is vacant, occupied or existent.
BY MS. MEYER:
Q Okay. Does that information refer to the count for that particular housing unit?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: Can you say that again?
BY MS. MEYER:
Q Let me rephrase.
Would you get a probability as to the count of that particular housing unit to say -- if you determined that it was probable that the unit

was occupied, what would be the next step to get a count for that unit?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: I would have to check with the detailed methodology. I can't answer that right off the top of my head.

BY MS. MEYER:

Q Would it be a probability that it's probable that there's two people in the housing unit, or would you look to different sources to determine the actual count?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: I would have to check the detailed methodology to answer that question.

BY MS. MEYER:

Q When the Census Bureau uses statistical models, does it develop any rules for using these models?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not sure what you mean

by "rules."
BY MS. MEYER:
Q So you mentioned that there might be different ranges in probability --
A Uh-huh.
Q -- would the Census Bureau develop any rules with respect to what these ranges mean?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: That depends on the use of the probability information. So it could -- it could vary depending on the purpose of producing that information, and what its intended use is.
BY MS. MEYER:
Q So here, when we're talking about the intended use of producing a probability of being a U.S. citizen --
A Uh-huh.
Q -- would the Census Bureau develop rules to determine what that probability would be?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: The -- when the Census Bureau determines the methodology that will

be utilized to create the statistical models, then that would be addressed at that time.

BY MS. MEYER:

Q So would -- would the Census Bureau produce some type of threshold, like, for example, .6 means you're a citizen?

MR. SVERDLOV: Objection. Vague and calls for speculation.

THE WITNESS: For this particular project, the methodology would need to be finalized to determine what this probability means in relation to someone being a U.S. citizen.

BY MS. MEYER:

Q And has the Census Bureau developed any rules with respect to producing this probability as of now?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: In terms of the probability for being a U.S. citizen, that would be based on the statistical models for use with a citizen voting age population data product, the Bureau has not finalized its methodology.

BY MS. MEYER:

Q And when is it expected to finalize the methodology?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has stated that its goal is to have that methodology developed by the Spring of 2020.

BY MS. MEYER:

Q And -- does the Census Bureau intend to create any probability with respect to whether an individual noncitizen is a legal noncitizen?

MR. SVERDLOV: Objection. I'm going to -- I'm going to instruct the witness not to answer on the basis of deliberative process privilege because the methodology and the means of complying with the executive order are still in development and ongoing.

BY MS. MEYER:

Q Is there a plan to create a probability with respect to whether an individual citizen is a legal noncitizen?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has to analyze data. It has to assess the data that we've acquired from other administrative -- from other federal agencies. The Bureau would need to assess those data and then determine what methodology might be appropriate to comply with the executive order.

BY MS. MEYER:

Q Is there a plan to create a probability with respect to whether an individual noncitizen is an undocumented resident?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Again, the Census Bureau has to continue to analyze and assess additional administrative records and then determine what methodology might be best suited to help us comply with the executive order.

BY MS. MEYER:

Q So looking back, again, in Attachment 1, it says that the objective, as we've discussed, of the project is to determine the number of citizens and noncitizens in the country --

A Uh-huh.

Q -- if the Census Bureau were to -- to develop any plans with respect to legal status, would this memorandum of agreement need to be modified?

MR. SVERDLOV: Objection. Calls for speculation. Calls for a legal conclusion. And to the extent that it pertains to ongoing methodology, our view is that it would be protective by deliberative process privilege, so I instruct the witness not to answer.

BY MS. MEYER:

Q Looking at Attachment 1, again -- again, the first paragraph, second sentence, it says: "The citizenship probability will be used together with age, race and ethnicity and location information from the 2020 census to produce a citizen voting age population, CVAP statistics," correct?

A Yes.

Q And how will the citizenship probability be used with age, race and ethnicity and location

information?

MR. SVERDLOV: Objection. Vague. To the extent that it concerns a methodology that the Census Bureau has not yet finalized, that information would be protected by the deliberative process privilege, so I will instruct the witness to answer in general terms if she can.

THE WITNESS: The Census Bureau has not finalized its methodology about how it would use all of these information yet to develop the citizen voting age population data project.

BY MS. MEYER:

Q Will this determination be made in the Spring of 2020?

A That's the goal of the Census Bureau, yes.

Q Where will this information with respect to age, race and ethnicity and location come from?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The age, race, ethnicity and location information would come from data from the 2020 census.

BY MS. MEYER:

Q Has the Census Bureau made a determination of whether the CVAP statistics will be used to determine the number of citizens and noncitizens in the country?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The Census Bureau has posted on its website that the citizen voting age population data product to be released in March of 2021 would contain information on estimates of those who are citizens at 18 years of age or older by their race and ethnicity information.

BY MS. MEYER:

Q The second paragraph of this attachment discusses PIKs, which I know we talked a little bit about.

A Uh-huh.

Q What files are the PIKs based on?

MR. SVERDLOV: Objection. Vague. Assumes facts not in evidence.

THE WITNESS: The person verification

system is the system that the Census Bureau has in place to help it link individual records across censuses, surveys and administrative records. And so that system is utilized. And when newly-acquired administrative records -- when they are able to validate the identity of the individuals on these newly-acquired individual records, then the Census Bureau is able to assign this protective identification key, which is just a unique identifier that is created that does not include any personal information.

BY MS. MEYER:

Q And then looking at the third sentence of the second paragraph, it says, "The citizenship probability for persons in the 2020 census without PIKs will be estimated based on local area information and the person's demographic characteristics, but not the person's citizenship, which makes the estimate much less accurate than if the person's citizenship information were available."

Why is this information much less

accurate?

A Because the -- the goal of the project is to utilize information from administrative records that tell us information about the person's citizenship status and that would be utilized in the statistical model to help us come up with the probability. But if there is no citizenship information that can be utilized, then that makes the result less accurate.

Q Does that make the result less accurate for everybody?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The analyses and research and testing would have to answer that question.

BY MS. MEYER:

Q And what local area information will the citizenship probability be based on?

MR. SVERDLOV: Objection. Vague. And to the extent it concerns the Census Bureau's methodology that is still in development, I would instruct the witness not to answer on the basis of the deliberative process privilege.

BY MS. MEYER:

Q What demographic characteristics will the citizenship probability be based on?

MR. SVERDLOV: Objection. Vague. And I will give the same instruction for the same reason.

BY MS. MEYER:

Q Where might demographic characteristics that the Census Bureau has access to come from?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I need a little more context into what you're asking.

BY MS. MEYER:

Q So with respect to demographic characteristics for a person, who doesn't have a PIK, what sources of information would the Census Bureau have with respect to those individual's demographic characteristics?

MR. SVERDLOV: Objection. Vague and calls for speculation.

THE WITNESS: In terms of what specific data the Census Bureau might use to develop the

citizen voting age population data, what we know at this time is to use data from both the decennial census of 2020 as well as administrative records. Once the evaluation and assessment of those administrative records have been completed and the methodology has been completed, then we'll have more information about specifics of what exact data will be used for what purpose in the development of these data.

BY MS. MEYER:

Q Are noncitizens more likely to be missing citizenship data than citizens?

MR. SVERDLOV: Objection. Calls for speculation. And to the extent the Census Bureau hasn't completed its methodology work in this area, I will instruct the witness to answer only in general terms, if she can.

THE WITNESS: I believe the David Brown paper produced some information connected to your question.

BY MS. MEYER:

Q And if there is missing citizenship data

for certain individuals, how does this affect the modeling of predicting citizenship data?

MR. SVERDLOV: Objection. Vague. Calls for speculation. I will direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q Could this affect the modeling of predicting citizenship?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: I think that will be known once the Census Bureau has completed its evaluation and analyses and is ready to finalize their model.

BY MS. MEYER:

Q If we could look at the last paragraph --

A Uh-huh.

Q -- the first sentence says, "Once citizenship data sources in the 2020 census person file have been assigned PIKs, the citizenship data will be linked to the 2020 census person file."

What is that file?

A The Census Bureau, I believe, in the John Abowd presentation, we looked at earlier, provides information on what census file they are linking.

Q Okay. And it explains that the model will be estimated for each person with a PIK using them as current citizen status from each available citizenship source for the person.

What about people without a PIK, how will you get citizenship status for them?

MR. SVERDLOV: Objection. Vague. Calls for speculation. And I will instruct the witness not to answer on --

(Thereupon, the court reporter clarified.)

MR. SVERDLOV: -- deliberative process privilege.

MS. MEYER: Okay. Will the court reporter please mark this as Exhibit 11?

(Exhibit 11, Existing Administrative Records Data Available At Census For Early Evaluation For Use Of The Citizenship Project, was

marked.)

MR. SVERDLOV: Counsel, can we go off the record just for a second?

VIDEOGRAPHER: We're going off the record. The time is 2:23 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 2:35 p.m.

MS. MEYER: We're on the record.

BY MS. MEYER:

Q So, Ms. Battle, you have been handed a document that the court reporter has marked as Exhibit 11. The document is titled "Existing Administrative Records Data Available At Census For Early Evaluation For Use Of The Citizenship Project."

Do you have this document in front of you?

A Yes.

Q Do you recognize this document?

A Yes.

Q What is the citizenship project

referenced in the title of this document?

A This references the project who developed the citizenship for the citizenship voting age population data project.

Q And what sources of data is the Census Bureau considering to use to obtain citizenship data from this list?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you repeat that, please?

BY MS. MEYER:

Q What sources of data is the Census Bureau considering to use to obtain citizenship data from this list?

MR. SVERDLOV: Same objection.

THE WITNESS: The Census Bureau is considering data from the Social Security Administration, as well as the Internal Revenue Service 1040, 1099 data.

BY MS. MEYER:

Q And does the Social Security Administration data include the Numident?

A The Numident -- the Numident file is the file from the Social Security Administration that the Census Bureau has obtained updates from -- for a number of years. So the Numident and the quarterly updates are the information that the Census Bureau utilized for this project.

Q Okay. And, at the top of this table, the fifth column says, "Used for citizenship content or to improve record linkage," what does that mean?

A One, the data may be utilized to determine or ascertain what the citizenship status is for that particular individual. And then, in addition, the data in this administrative record may be used to help us to just update the personal information, in terms of names, maybe someone has gotten married and the name has changed or different address. So it's a way to keep up-to-date, so that the report linkages will be -- to help the record linkages.

Q And the sixth column refers to the agency department represented on the EO, interagency

working -- work group. Is this the same interagency work group that we were discussing with respect to the executive order?

A Yes.

MS. MEYER: Will the court reporter mark this as Exhibit Number 12?

(Exhibit 12, Background Sheet To Creating An Interagency Working Group and Establish Agreements For New Data, was marked.)

BY MS. MEYER:

Q Ms. Battle, do you have the document in front of you titled "Background Sheet To Creating An Interagency Working Group and Establish Agreements For New Data."

A Yes.

Q Do you recognize this document?

A Yes.

Q Okay. And what is the general purpose of this document?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The purpose of this document is to show the membership of the

interagency working group and to list the different sources of data and the status of those data that could be used to help in complying with the executive order.

BY MS. MEYER:

Q Okay. And the interagency working group, is that the same working group we've been referring to?

A Yes.

Q And if you turn to Page 2 of this document, the second page before the chart refers to the citizen/noncitizen tabulation project; is that right?

A Could you repeat where you are?

Q Yeah. Right before the table, in the bullet point about the table on Page 2.

A Yes.

Q The document refers to the support non -- support citizen/noncitizen tabulation project, correct?

A Yes.

Q And what is that project?

A This is the project that was referred to in the memorandum of understanding that we looked at where the project is working to determine citizenship status for individuals.

Q Okay. And are these sources listed in the tables in Exhibit 12 and those listed in Exhibit 11, which we were just looking at --

A Uh-huh.

Q -- are these the only sources of data that the Census Bureau is currently considering to use for the project to obtain citizenship data?

A These are the sources that the Census Bureau has pursued. The Census Bureau has also reached out to states to -- for instance, obtain driver's license data. So this list reflects, I believe, the one state where we have an agreement -- state of Nebraska.

Q And that's on Page 5 of this document --

A Uh-huh.

Q -- the Nebraska data that you're referring to?

A Yes.

Q So other than the sources of data listed here and the additional state data that you just mentioned, are there any other sources of data that the Census Bureau is considering using for this project?

A The Census Bureau has also considered pursuing TANF, Temporary Assistance for Needy Families, SNAP data, supplemental nutrition program. So those are other data sources.

Q And are those sources maintained by the states?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not -- I'm not sure.

BY MS. MEYER:

Q Okay. Have there been any revisions or updates to this document, Exhibit 12, since January 16, 2020?

MR. SVERDLOV: Objection. Vague.

BY MS. MEYER:

Q And January 16th was the previous deposition.

A Yes.

Q Your counsel provided us with an -- updated --

MS. MEYER: Can I have the court reporter mark this as Exhibit 13?

(Exhibit 13, Background Sheet 2, was marked.)

BY MS. MEYER:

Q And, Ms. Battle, you have a document in front of you called "Background Sheet 2," as well that your counsel provided to us. Does this document reflect the updates since January 16th, 2020?

A Yes.

Q And do you know what those updates are?

A The Census Bureau added on Page 6, the Department of State Passport Services data, and the Census Bureau added the -- on Page 7, the Indian Health Services data; and some of statuses in the status column, have been updated from waiting to receive data to fitness for use determination.

Q In that status column, what does "fitness

for use determination" mean?

A That refers to the data are being evaluated and assessed to determine if they can be used in the work that we're doing.

Q And by "in the work that you're doing," what do you mean by that?

A In working to comply with the executive order.

Q And how does this Census Bureau go about determining fitness for use?

A Well, again, the Bureau has to start off by, first of all, just ensuring that the data that we are receiving, we're able to read it into your systems. We need to ensure that all of the variables that we have requested are there. But then the -- the analyst will then take those data and evaluate them and assess them, the quality, the completeness, you know, one purpose of these data would be to improve record linkages, but if we have files where address is missing for half of the file or where data are incomplete, we have to be able to assess, are we able to use these data.

And then once data had been assessed and evaluated, the methodology can be finalized.

Q Okay. So has there been any determination that any of the data the Census Bureau is considering is fit for use?

A That evaluation work is ongoing right now.

Q And as part of that fitness for use determination, do you look to the purpose -- the ultimate purpose of what the Census Bureau will use the data for?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The analysis and evaluation of the data will take into consideration the purpose for which we have acquired those data.

BY MS. MEYER:

Q Are you currently looking at whether or not this data can be used to determine legal status?

MR. SVERDLOV: Objection. I'll direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q In this second to last column on Exhibit 13, it says, "Used for citizenship content or to improve record linkage."

A Uh-huh.

Q What does that mean?

A So the data acquired from the federal agency could be used in -- either to obtain information about the citizenship status for that particular individual or the data could also be used to, again, help us make sure we have up-to-date personal information like name, address, et cetera, to help facilitate the record linkages.

Q And who makes the determination as to whether something is used for citizenship or for record linkage?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The evaluation and the analyses of the data, that work will determine if we're able to use this particular administrative

record source for one or both purposes.

BY MS. MEYER:

Q Of the data types listed here and then -- and the data types listed in Exhibit 11 --

A Uh-huh.

Q -- do any of these data types contain information with respect to noncitizens?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: Yes.

BY MS. MEYER:

Q Okay. And what are those?

A Well, one data source is the Department of Homeland Security. On Page 2 --

Q Uh-huh.

A -- where it indicates that the Census Bureau is receiving the lawful permanent resident file, as well as data from the arrival/departure information system and visa data.

Q Okay. Any other sources?

A Another source would be the

Department of State on Page 3, the refugee admission processing system data.

And we may need to look at the memorandums of understanding to dig deeper into the variables for each of these records to determine if the -- the nature of the data and what it could be used for.

Q Understood.

Any other sources here with respect to information on noncitizens?

A Again, I think we would have to take a look at the memorandum of understanding to know for sure, and that information should be in those agreements.

Q And with respect to the records that you identified, so with the Department of Homeland Security records and the Department of State records --

A Uh-huh.

Q -- what information with respect to legal status do these records contain?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The memorandums of understanding would have all of the variables and have that information.

BY MS. MEYER:

Q So if we look back to the memorandum of understanding with DHS --

A Uh-huh.

Q This is Exhibit 10. Where would we look to understand what information about legal status that these records contain?

A On Addendum 1, on Page 20 --

Q Uh-huh.

A -- there's a list there of the data elements that were requested for the data from the U.S. Citizenship and Immigration Service?

Q I'm sorry. Go ahead.

A On page -- and on -- on Page 1 of addendum 2 --

Q Uh-huh.

A -- the Customs and Border Patrol transfer of data lists the data elements requested there, carries over onto Page 2.

And then in Addendum 3 on Page 5, it lists the data elements from the U.S. Immigrations and Customs Enforcements.

Q And are there any shortcomings in this DHS data?

MR. SVERDLOV: Objection. I'll direct the witness not to answer on basis of deliberative process privilege.

BY MS. MEYER:

Q Is there any missing data in DHS data?

MR. SVERDLOV: Objection. Same instruction on the basis of the fact the witness has testified that the analysis of this data remains ongoing.

BY MS. MEYER:

Q When there is data that is conflicting in administrative records, generally, what does the Census Bureau do to determine which data source to use?

MR. SVERDLOV: Objection. Vague and calls for speculation.

THE WITNESS: That really depends on the

project, the goals of the project, the data you're trying to develop.

BY MS. MEYER:

Q Does the Census Bureau develop rules to determine what records to use if there is conflicting data with respect to certain information?

MR. SVERDLOV: Same objection.

THE WITNESS: Again, it really comes down to the nature of the project, the purpose.

BY MS. MEYER:

Q Has the Census Bureau in the past developed rules when there are conflicting sources of data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: In terms of editing and imputation procedures for data, for example, collected in the decennial census, the Census Bureau has to look at data that might be in conflict and resolve any inconsistencies.

BY MS. MEYER:

Q And how does the Census Bureau resolve

those inconsistencies?

A Well, it depends on the specific variable. For example, if -- when it comes to age, we have a question on age and we have a question on date of birth, and as a quality check, we calculate age from data of birth and compare it to the reported age. And if that comparison shows that the data are discrepant, then Census Bureau -- and the discrepancy is greater than two years, the Census Bureau may utilize the data that's generated from the date of birth as viewed as being perhaps more accurate.

Q And who developed those rules?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: These are part of business rules that the Census Bureau has for editing and imputing characteristics data. And those rules are developed by the population division for the data items in the decennial census.

BY MS. MEYER:

Q And why did the Census Bureau choose if the date of birth had a two-year discrepancy, who

made that -- why make that determination as opposed to three years?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: Based on research that the Census Bureau has conducted, it deemed that that was -- that two-year window was -- was acceptable for our purposes.

BY MS. MEYER:

Q So when the Census Bureau makes a determination as to whether something is acceptable, does it do research to determine what is acceptable and what is not?

MR. SVERDLOV: Objection. Vague and argumentative.

THE WITNESS: Can you repeat that question, please?

BY MS. MEYER:

Q When the Census Bureau makes a determination as to whether something is acceptable, like the two-year window, does it do research to determine what is acceptable?

MR. SVERDLOV: Same objection.

THE WITNESS: The Census Bureau would want to make data decisions that are data driven based on research, data driven.

BY MS. MEYER:

Q And how long does that research usually take?

A It depends on the topic, the -- the research project itself, the goal, the purpose. It can vary depending on what you're trying to achieve.

Q Do you know approximately how long it took for the date of birth, for example?

A I do not know that.

Q In the sources of data that we've been looking at in the background sheets --

A Uh-huh.

Q -- are there certain groups that are more likely than not to have inaccurate data?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: Can you repeat that,

please?
BY MS. MEYER:
Q Are there certain groups, who are more likely than not, to have inaccurate administrative data?
MR. SVERDLOV: Same objection.
THE WITNESS: The David Brown paper presented some information based on the research that was conducted for that particular paper.
BY MS. MEYER:
Q So the data we've been discussing with respect to the MOU comes from DHS; is that correct?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: Can you repeat that, please?
BY MS. MEYER:
Q Yeah. The data we've been discussing with respect to the memorandum of agreement between the Census Bureau and DHS, that data comes from DHS, correct?
Exhibit -- I'm referring to Exhibit 10.

Sorry.

A Exhibit 10?

Q Yeah. The memorandum of agreement. You've got it.

A So the data elements --

Q Uh-huh.

A -- included in the three addendums that we looked at reflect data that comes from the Department of Homeland Security.

Q Okay. And if we go back to Exhibit 7 for a minute, which is the March 1st, 2018, memorandum.

A Uh-huh.

Q If I can direct your attention to Page 3 -- or if you're looking at the Bates stamp, 39.

A Uh-huh.

Q The second paragraph here refers to data from USCIS, correct?

A This paragraph -- this paragraph discusses data from U.S. Citizenship and Immigration Services.

Q Okay. And that's from DHS, correct?

A That's from the Department of Homeland Security.

Q And if you look about halfway down the paragraph, at the sentence starting "the data do not cover" --

A Yes.

Q It says, "The data do not cover naturalizations occurring before 1988, as well as not covering and some between 1988 through 2000," correct?

A Yes.

Q And it also talks about that the data does not always cover children under 18 at the time the parent became a naturalized U.S. citizen, correct?

A Yes.

Q Is there any reason that the data from DHS now covers that information?

MR. SVERDLOV: Objection. Vague and beyond the scope of this deposition.

THE WITNESS: I'm not --

MR. SVERDLOV: I'll actually direct the witness not to answer.

MS. MEYER: Will the court reporter, please, mark this as Exhibit 14?

(Exhibit 14, Potential Improvements to DHS Illegal Alien Population Estimates Collection and Use of Data, was marked.)

BY MS. MEYER:

Q Ms. Battle, you have a document in front of you entitled "Potential Improvements to DHS Illegal Alien Population Estimates Collection and Use of Data," dated March, 2019, correct?

A Yes.

Q If you can turn to Page 2 of that report -- apologies -- Page 3?

A Yes.

Q Thank you.

If you look at the second bullet point of this -- under results, it says, "DHS uses administrative data on LPR, refugee, asylee and nonimmigrant admissions along with nationalizations to build its estimate of the

legally resident foreign-born population, but DHS does not know how many lawfully admitted aliens have deceased or departed the United States," correct?

A Yes.

Q And DHS above explains that these data limitations mean that this population cannot be described with precision; is that correct?

A I see the sentence where it says, "Data limitations mean that neither of these populations can be described with precision."

Q And is this data the same data that the Census Bureau is now considering?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The information in the Reference Sheet Number 2 reflects the information on administrative records that the Census Bureau is considering to use.

BY MS. MEYER:

Q And that's -- includes information from DHS, correct?

A And that reference sheet includes

information from the Department of Homeland Security.

Q And in particular, it includes DHS information on LPRs, correct?

A The reference sheet does list the lawful permanent resident file from the U.S. Citizen and Immigration Services, yes.

Q Are there any other limitations with respect to DHS data that you're aware of?

MR. SVERDLOV: Objection. Because work in the area is ongoing, I will direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q If you turn back to the memorandum of agreement, so, again, Exhibit 10.

A Uh-huh.

Q If you look at the MOA Addendum 2, it's titled "CDP Transfer of Data" --

A Yes.

Q -- Page 1.

A Uh-huh.

Q In the second paragraph, it says that CDP will not transfer records pertaining to individuals protected by 8 USC Section 1367, and then in parenthesis it references those who have U and T visas, correct?

(Thereupon, the court reporter clarified.)

MS. MEYER: U and T visas.

BY MS. MEYER:

Q Correct?

A Yes.

Q And so DHS is not transferring to the Census Bureau data with respect to U visas and T visas; is that correct?

A This addendum states that CDP will not transfer those records.

Q So how will the status of those people be determined?

MR. SVERDLOV: Objection. Vague. Calls for speculation. I'll direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q Will the citizenship probability model be less accurate than if you have this data?

MR. SVERDLOV: Direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q Other than the DHS data, does the Census Bureau have any other sources of data right now as to U visas or T visas?

A Could you repeat that, please?

Q Other than the DHS data, does the Census Bureau have any other sources of data with respect to individuals with U visas or T visas?

A I'm not aware of that.

Q Has the Census Bureau received any information about how many lawfully-admitted residents have deceased or departed?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Could you say that again?

BY MS. MEYER:

Q Has the Census Bureau received any

information about how many lawfully-admitted residents have deceased?

A I'm not aware of that information.

Q What about any information with respect to how many lawfully-admitted residents have departed?

A I'm not aware of that information.

MS. MEYER: Will the court reporter, please, mark this as exhibit -- what are we up to?

REPORTER: Fifteen.

MS. MEYER: Fifteen.

(Exhibit 15, The Privacy Impact Assessment for the Department of Homeland Security, was marked.)

BY MS. MEYER:

Q Ms. Battle, you have a document in front of you marked Exhibit 15 entitled "The Privacy Impact Assessment for the Department of Homeland Security"; is that correct?

A Yes.

Q If you turn to Page 2 of this document --

MR. SVERDLOV: I'm sorry. What page are

we on?

MS. MEYER: Page 2.

BY MS. MEYER:

Q For the LPR data described in Page 2, does this correspond with the background information sheet we've been discussing? I'm just trying to match them up.

MR. SVERDLOV: Objection. Vague. I'm also going to object on the basis of foundation because this is a DHS document.

MS. MEYER: It was covered in our topics.

BY MS. MEYER:

Q Actually, I think this is easier. Let me direct your attention to Appendix A of the document, so it's Page 16.

A Okay.

Q At the top of Appendix A, it says, "USCIS will provide naturalization and LPR data."

A Uh-huh.

Q Does this data correspond with what is listed on the background sheet to Exhibit 13, lawful permanent residents' file and

naturalization data?

A The Census Bureau in its memorandum of understanding has requested the lawful permanent resident file and naturalization data, and this document from the Homeland Security says they will provide naturalization and lawful permanent residents' data.

Q So in the background sheet Number 2, it says under variables that the lawful permanent residents' file and naturalization data contained 46 variables; is that correct?

A Yes.

Q And I'm just trying to understand on Page 16, is this a list of those variables?

A The list of the variables should be in the memorandum under -- of agreement or understanding.

Q Not the privacy impact --

(Thereupon, the court reporter clarified.)

MS. MEYER: -- impact assessment?

THE WITNESS: I can't speak to

Homeland Security's document on that issue.

BY MS. MEYER:

Q Okay. Can you show me where the variables are listed in the memorandum of understanding? This is Exhibit 10.

A The Addendum 1 for the U.S. Citizenship Immigration Services provides a list of individual data elements.

Q Uh-huh.

A And those correspond with the 46 variables. I may need to count them again.

Q But they should correspond with them?

A They should correspond.

Q Okay. And in the background sheet Number 2, so Exhibit 13 again, that we've been looking at --

A Yes.

Q -- is there information in the sources of data with respect to undocumented residents?

MR. SVERDLOV: Objection. Vague and asked and answered, I believe.

THE WITNESS: I would need to rely on the

evaluation of the data to be able to answer that.
BY MS. MEYER:
Q Okay. What administrative records from the states has the Census Bureau asked for?
A Could you repeat that again?
Q What administrative records from the states has the Census Bureau asked for?
A I'm aware of the Census Bureau asking for driver's license data, and I believe the temporary assistance for needy families, the SNAP data, also state-level data, that those have been requested as well.
Q And how many states have provided records to date?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: I do not have that information.
BY MS. MEYER:
Q Do you have an estimate as to how many states have provided records?
A In terms of driver's license data, I know that about a third of the states have agreed, but

we only have agreements signed and in place so far with Nebraska.

Q And when do you expect to have agreements in place with the other states that agreed to provide data?

MR. SVERDLOV: Objection. Foundation.

THE WITNESS: I do not have that information.

BY MS. MEYER:

Q Have there been agreements made -- with those one-third of states that have agreed to provide data to enter into an agreement to provide that data?

MR. SVERDLOV: Objection. Vague and confusing.

THE WITNESS: Can you say that one more time?

BY MS. MEYER:

Q Sure. For the one-third of states that have agreed to provide data, have there been -- withdrawn.

For the two-thirds of states that have

not provided data --

A Uh-huh.

Q -- are there any plans for them to provide data currently?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not aware of plans.

BY MS. MEYER:

Q What state records have you received to date?

A Well, our reference sheet on Page 6 indicates that we have data from Nebraska at this time.

Q Has the Census Bureau conducted any determination of the completeness of state records?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: That work is ongoing.

BY MS. MEYER:

Q Does the Census Bureau need data from the states to evaluate the completeness of those records?

MR. SVERDLOV: Objection. Vague. And

I'll direct the witness not to answer because it concerns ongoing work at the Census Bureau.

BY MS. MEYER:

Q If you have one -- if you have records from one state, like Nebraska, but not another, will that affect how well this citizenship model determines a citizenship probability?

MR. SVERDLOV: Objection. Vague. I'll direct the witness not to answer on deliberative process privilege.

BY MS. MEYER:

Q What is CoreLogic data?

A CoreLogic data reflect administrative records that, I believe, were utilized to obtain information on like property taxes, deeds to help us with imputation of tenure of housing units whether or not they're owned.

Q And is the Census Bureau considering using CoreLogic data for the citizenship project?

MR. SVERDLOV: I'll direct the witness not to answer on deliberative process privilege.

BY MS. MEYER:

Q Is CoreLogic data listed anywhere in the sources that the Census Bureau is considering using?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: We -- it is not included in -- in our reference sheet Number 2.

BY MS. MEYER:

Q Of the sources of data that are considered in the reference sheet 2 and in Exhibit 11, which we discussed earlier, has the Census Bureau conducted any evaluation concerning the feasibility of using these records to determine the number of legal noncitizens in the U.S.?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Can you repeat that, please?

BY MS. MEYER:

Q Of the sources of data in Exhibit 13 and Exhibit 11, has the Census Bureau conducted any evaluation concerning the feasibility of those records to determine the number of legal

noncitizens in the U.S.?

A The Census Bureau is conducting evaluation and analyses of these administrative records to see how they can be used to help us comply with the executive order.

Q Does that include determining the number of legal noncitizens in the U.S.?

A The -- some of these administrative records will have information on the status of individuals. And that information, again, will be accessed and evaluated as the Bureau works to comply with the executive order.

Q And has the Census Bureau conducted any evaluation concerning the feasibility of using these records to determine the number of undocumented immigrant residents?

A The Census Bureau is evaluating and assessing the acquired administrative records, so that we can determine how they could be used to help us comply with the executive order.

Q Are there any other -- and does that include the undocumented residents?

A The executive order calls for the development of numbers of those who are citizens and noncitizens and undocumented immigrants. So the Bureau will be evaluating administrative records to see what data are available to help them comply with that.

Q Are there any other administrative records that are not contained in these documents that the Census Bureau is aware of that contain information with respect to legal status?

MR. SVERDLOV: Objection. Vague.

BY MS. MEYER:

Q Let me clarify: By "these documents," I mean background sheet Number 2, Exhibit 13 and Exhibit 11.

A Can you, please, repeat your question?

Q Uh-huh. Are there any other administrative records that are not contained in background sheet Number 2, Exhibit 13 and Exhibit 11, that the Census Bureau is aware of that contain information with respect to legal status?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I am not sure if the Bureau is aware of other records.

BY MS. MEYER:

Q If we go back to Exhibit 7, this is the March 1st, 2018, memorandum --

A Uh-huh.

Q -- and if we look at P40 --

(Thereupon, the court reporter clarified.)

BY MS. MEYER:

Q About halfway down the page under the subheading "Can Survey Data Address," the third sentence in -- says that there is no feasible method of independently verifying noncitizen status, correct?

A I'm sorry. I'm not quite where you are.

Q It's okay. The third sentence, it starts with "A significant" --

A Okay.

Q -- and at the end of that sentence, there's a determination of no feasible method of

independently verifying noncitizens status -- there is no feasible method of independently verifying noncitizens status, correct?

A I defer to the statement in this document.

Q And after looking at the administrative records that have been shared as part of the executive order, has the Census Bureau's assessment of this changed?

MR. SVERDLOV: I'm going to direct the witness not to answer on the basis of deliberative process privilege.

BY MS. MEYER:

Q What does the Census Bureau usually do to test new methods for apportionment?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: In terms of methods that impact the collection of data that are used to develop the apportionment population counts, the Census Bureau has a testing and research program in place, where as new methodologies are identified, those methodologies have to be tested

and research has to be conducted.
BY MS. MEYER:
Q And does the Census Bureau usually consult stakeholders in their research and testing?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: In preparation for the 2020 census, the Census Bureau has consulted and presented to a number of stakeholders to discuss the research and testing throughout the decade.
BY MS. MEYER:
Q Okay. And when does the Census Bureau consult with these advisory committees?
MR. SVERDLOV: Objection. Vague.
THE WITNESS: The Census Bureau meets with its advisory committees at least twice a year. And those meetings are the -- provide the opportunity for the Census Bureau to discuss developments for the 2020 census and research and testing.
BY MS. MEYER:
Q And has the Census Bureau consulted with

these advisory committees with respect to its plans to determine citizenship status?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau has presented the presentation we were discussing earlier, where John Abowd presented to the Census Scientific Advisory Committee in September of 2019 and provided some general information about the work that the Census Bureau was doing and provided high-level milestones.

BY MS. MEYER:

Q Anything else that was presented?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I'm not aware of anything else that was presented.

BY MS. MEYER:

Q And you mentioned tests used for new methodologies. What kind of tests are used for methodologies in counting of --

(Thereupon, the court reporter clarified.)

MS. MEYER: -- the resident population.

THE WITNESS: The Census Bureau may conduct field tests or actually conduct tests related to a particular segment of the decennial census operation. So they may test segments of the developing the frame and verifying the frame that is used to determine the addresses in the decennial census.

The Census Bureau may conduct, again, field tests if they were considering methodology to change the design of the questions on the questionnaire. The Census, typically two years before the census, will conduct a test, where they test out all of the systems that are used to collect and process data to make sure those systems are integrated and functioning.

BY MS. MEYER:

Q And is there tests with respect to statistical models?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: If the Census Bureau is researching new approaches, for example, the Census Bureau researched ways to utilize the

administrative records as part of the nonresponse follow-up operation, and testing was done on that front.

BY MS. MEYER:

Q And how long did that take?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I don't have the timeframe off the top of my head.

BY MS. MEYER:

Q An estimate for how long it took?

A I don't have an estimate off the top of my head.

Q If we wanted to find out that information, where would we go?

A We would talk with the lead researcher over that particular work.

Q And who is the lead researcher for the nonresponse follow-up unit change --

(Thereupon, the court reporter clarified.)

MS. MEYER: -- change?

THE WITNESS: With regards to testing and

use of administrative records and the nonresponse follow-up operation, Vincent Mule, M-U-L-E, was the lead researcher over that work.

BY MS. MEYER:

Q -- and why does the Census Bureau test new methodologies for the census?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The quality standards state that we need to test our approaches that we are using for different phases of the lifecycle of a decennial census. We need to be able to determine whether our specifications have been implemented accurately. We need to determine whether this new approach is feasible and what the expected results may be for using this different methodology.

BY MS. MEYER:

Q Is one of the reasons because we want to ensure accuracy?

MR. SVERDLOV: Objection. Leading.

THE WITNESS: The Census Bureau wants to ensure that all of the operations that it uses to develop the data from the decennial census are --

are based on operations that provide accurate information and have been developed accurately.

BY MS. MEYER:

Q And does part of the testing make sure that the Census Bureau is complying with the statistical quality standards?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: The statistical quality standards may say that, for example, pretesting needs to take place with your questionnaires, and then the operations will need to go out and conduct that work.

BY MS. MEYER:

Q So testing is consistent with the statistical quality standards?

MR. SVERDLOV: Objection. Vague. Calls for a legal conclusion.

THE WITNESS: The statistical quality standards will identify areas along the lifecycle of developing and conducting the census that should be tested.

BY MS. MEYER:

Q Are there tests that are currently scheduled with respect to the citizenship project?

MR. SVERDLOV: Objection. Vague.

BY MS. MEYER:

Q Let me clarify.

A Thank you.

Q Are there tests that are currently scheduled with respect to carrying out the executive order?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau right now is evaluating and analyzing these newly acquired administrative record data sources. And when we have finished that, the Bureau will, then, be able to think through what data from these administrative sources can help us in developing methodology to help us comply with the executive order.

BY MS. MEYER:

Q And after you have a methodology, then do you test?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: I do not have information on any further steps or milestones regarding that at this time.

BY MS. MEYER:

Q Would you do any testing before you had the methodology figured out?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: The Census Bureau has to start with the analysis and evaluation of data we have acquired. And when that is complete, then the Bureau can determine methodology and what those next steps will be to help us meet our ultimate goal of having a citizen voting age population data file ready and disseminated by March 31st of 2021.

BY MS. MEYER:

Q Okay. Is it fair to say that the testing would have to come after the methodology is developed?

MR. SVERDLOV: Objection. Vague and calls for speculation.

THE WITNESS: I do not have further information about what the exact steps will be after the methodology has been developed --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- has been developed.

BY MS. MEYER:

Q Does the Census Bureau plan to do post 2020 census studies to see how accurate the citizenship statistics are?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Can you repeat that again, please?

BY MS. MEYER:

Q Does the Census Bureau plan to do post 2020 census studies to see how accurate the citizenship statistics are?

MR. SVERDLOV: Same objection.

THE WITNESS: Can you clarify by what you

mean by "citizenship statistics"?
BY MS. MEYER:
Q The citizenship status that's developed as a result of this citizenship probability.
A I am not aware of any post 2020 evaluation plans to assess the accuracy of the citizen voting age population data file.
Q And post 2020 studies -- withdrawn.
Is the Census Bureau currently considering how it could provide the relief that Alabama currently seeks in this case?
MR. SVERDLOV: Objection. I will direct the witness not to answer on the basis of both attorney-client privilege and the deliberative process privilege.
BY MS. MEYER:
Q Right now, could the Census Bureau provide the relief that Alabama currently seeks in this case?
MR. SVERDLOV: Objection. Vague. Calls for speculation. Calls for a legal conclusion.
THE WITNESS: The Census Bureau would

need to analyze and evaluate these newly acquired administrative record datasets, and then be able to determine whether those data can be used to help us comply with the executive order.

BY MS. MEYER:

Q So as of now, the Census Bureau -- can the Census Bureau provide the relief that Alabama is seeking?

MR. SVERDLOV: Objection. Asked and answered. And same objection as before, as well.

THE WITNESS: The Census Bureau cannot answer that at this time.

MS. MEYER: Can we take a five-minute break?

MR. SVERDLOV: Yeah. Can we do like a 10, 15-minute break?

VIDEOGRAPHER: Going off the record at 3:42 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 4:05 p.m.

BY MS. MEYER:

Q Ms. Battle, how long does it typically take to analyze new administrative datasets and decide whether to rely on them to produce census data?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I think that depends on the particular administrative records, the purpose and the intended use for it. I think evaluation can vary depending on those factors.

BY MS. MEYER:

Q Is it a matter of months, years?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: The Census Bureau conducts research and testing throughout the decade to assess new methods to be used for the decennial census, such as the nonresponse follow-up use of administrative records and other such method changes and improvements.

BY MS. MEYER:

Q And earlier we were talking about this census unedited file that's used for

apportionment. Do you recall?

A Yes.

Q And that file is eventually edited, correct?

A The Census edited file -- the Census edited file contains data on age, sex, race and all kinds of characteristics along with the total population counts. And the age, sex, race and other characteristics data have been edited and imputed.

Q And when you say they have been edited, they have been edited from the census unedited file, right?

A The census starts with the census unedited file, and it's those total population counts are what's used for the apportionment. The census unedited file contains, again, age, sex, race, ethnicity data. Some information may be missing at that point. The data may not be complete at that point for those characteristics. And then the dataset, the census unedited file goes through the editing and imputation process,

and the output is census edited file, where we have complete filled in data information, age, sex, race, ethnicity.

Q And how long does that editing process take place?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau runs a data program that contains the business rules for the editing and imputation, and the Census Bureau will then need to spend time reviewing those outputs to make sure the programming wasn't indeed correct.

BY MS. MEYER:

Q And how long does that typically take?

A The Census Bureau in its schedule for the 2020 census calls for census unedited file to be ready by the end of November of 2020, and the census edited file is expected to be complete by January 25th of 2021.

Q And we talked earlier about the process of the testing. Do you agree that the process for testing methodologies for the census is typically

a multiple-year process?

MR. SVERDLOV: Objection. Vague and argumentative.

THE WITNESS: The Census Bureau typically plans a number of tests throughout the decade to test new methodologies. It could be that there are multiple tests that test the same methodology and its improvements.

BY MS. MEYER:

Q But the testing can take multiple years?

MR. SVERDLOV: Objection. Vague. Argumentative.

THE WITNESS: The testing can take multiple years.

MS. MEYER: And per previous conversations with counsel, we reserved our right to ask questions with respect to Topics 4, 6, 7 and 18 in the Defendant Intervenor's Notice of Deposition of the Census Bureau pursuant to Rule 30(b)(6) if an agreement on requests of information with respect to those topics are not reached.

MR. SVERDLOV: We understand your position. Thank you.

MS. GOLDSTEIN: We're just going to pass it straight to Andrea.

MR. SVERDLOV: Oh, okay.

EXAMINATION BY MS. SENTENO:

Q Good afternoon, Ms. Battle. My name Andrea Senteno. I am counsel for Martinez Intervenors.

Earlier today Ms. Meyers ran through rules of the road for today's deposition.

A Uh-huh.

Q And can we agree that the rules that were established earlier apply to this deposition's full day?

A Yes.

Q Wonderful.

Would it be correct to say that the decennial census enumerated population counts would not include estimates, for example, of the non-U.S. citizen population?

MR. SVERDLOV: Objection. Vague. Calls

for a legal conclusion.

THE WITNESS: Would you, please, repeat that one more time?

BY MS. SENTENO:

Q Sure. Would it be correct to say the decennial census enumerated population count would not include estimates, for example, of the non-U.S. citizen population?

MR. SVERDLOV: Objection. Vague and misleading and calls for a legal conclusion.

THE WITNESS: The decennial census enumerated population does not include estimates of -- of legal immigrants or undocumented immigrants.

BY MS. SENTENO:

Q And what is the rationale for not using estimates when creating the apportionment population count?

MR. SVERDLOV: Objection. Assumes facts not in evidence.

THE WITNESS: The Title 13 states that the apportionment population data may not use

sampling.

BY MS. SENTENO:

Q And so just to be clear, an estimate is a sample -- or withdrawn.

Just to be clear, an estimate is based off of sampling; is that correct?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The Title 13 references not including sampling. So estimates based on sampling are not to be part of the apportionment population counts.

BY MS. SENTENO:

Q Are there estimates that are not based on sampling?

A There are estimates, for example, the citizen voting age population data file that the Census Bureau is working to develop would be based on estimates coming from a statistical model.

Q And so is the estimate coming from a statistical model okay to include in the apportionment population count?

MR. SVERDLOV: Objection. Vague and calls for legal conclusion.

THE WITNESS: The Census Bureau is using statistical models in different aspects throughout the decennial census to -- which will be part of the development process of the decennial census data. So, for example, we talked earlier about the nonresponse follow-up operation that uses a statistical model to determine whether an address is existent or occupied --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- or vacant.

BY MS. SENTENO:

Q So, again, is an estimate that comes from a statistical model okay to use in the apportionment population count conclusion?

MR. SVERDLOV: Objection. Vague and calls for a legal conclusion.

THE WITNESS: I would have to defer to a legal team to determine if that is in violation of Title 13.

BY MS. SENTENO:

Q But it's fair to say an estimate based on sampling cannot be used in the apportionment population count?

A Per Title 13, sampling cannot be used to develop apportionment population count.

Q And would you agree with me, then, that the apportionment population count isn't -- is an enumerated population count?

MR. SVERDLOV: Objection. Argumentative.

THE WITNESS: The apportionment population count is based on the enumeration of the population.

BY MS. SENTENO:

Q And are they the same as the enumeration -- is the apportionment population count the same as the enumerated population count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The apportionment population count is based on an enumeration of the population.

BY MS. SENTENO:

Q Can you give me an example currently of the Bureau using a statistical model to assign characteristics to individuals for the decennial census?

A Can you repeat that one more time, please?

Q Sure. Can you give me an example currently of the Bureau using a statistical model to assign characteristics to individuals for the decennial census?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: So in the editing and imputation process where the Census Bureau is working to fill in values for characteristics that may have been left blank on the census form, one method that the Bureau uses is hot deck imputation. And hot deck imputation can be thought of as a form of statistical modeling, where you are working to fill in those missing data by using information from a nearest neighbor that wasn't reported in the census.

BY MS. SENTENO:

Q Would it be correct to say that the Bureau has never produced an enumeration or estimate of the undocumented population in the United States?

MR. SVERDLOV: Objection. Vague. And to the extent -- excuse me -- to the extent the question concerns time beyond the scope that was negotiated, it would be outside of the scope of the deposition.

THE WITNESS: Can you re -- restate that?

BY MS. SENTENO:

Q Sure. I can restate it.

Would it be correct to say that the Bureau has not in -- has not produced an enumeration or estimate of the undocumented population in the United States?

MR. SVERDLOV: Same objection.

THE WITNESS: The -- I am not aware of the Census Bureau producing -- an -- a number based on an enumeration that reflects the undocumented population. The Census Bureau has developed estimates of the undocumented population

in the past.

BY MS. SENTENO:

Q You said that the Census Bureau has developed estimates for the undocumented population in the United States in the past.

A Uh-huh.

Q What geography -- at what level of geography have they -- have they produced that estimate?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The -- the Census Bureau in the past has produced estimates of the undocumented population at the national level as well as the state level.

BY MS. SENTENO:

Q And could you tell me where we would be able to find the Census Bureau's previous estimates of the undocumented population?

A Those estimates are available on our website. There are several documents that pertain to that, and there are working papers or research

papers that are available on our website.

Q Can you tell me if the Census Bureau has produced an estimate of the undocumented population in the past ten years?

A The Census Bureau -- I'm not aware of the Census Bureau publishing any estimates of the undocumented population in the last ten years.

Q Can you tell me when the last time the Census Bureau produced -- when was the last time the Census Bureau produced an estimate of the undocumented population in the United States?

A The Census Bureau published on its website estimates of the undocumented immigrant population in 2001.

(Exhibit 16, Estimate of Undocumented Population, was marked.)

BY MS. SENTENO:

Q Ms. Battle, I've marked that document for you as Exhibit 16.

A Uh-huh.

Q And it was provided to us today by Counsel as one of the documents used to prepare

you for today's deposition; is that correct?

A Yes.

Q Is that the last -- sorry. Is that the -- sorry. Withdrawn.

Do you recognize Exhibit 16?

A Yes.

Q And is that the most recent estimate the Census Bureau has produced of the undocumented population in the U.S.?

A This is the most recent estimate of the undocumented immigration that I'm aware of that the Census Bureau produced.

Q Now, would you agree with me that the Census Bureau does not employ statistical sampling to create the apportionment population count?

MR. SVERDLOV: Objection. Vague. Argumentative.

THE WITNESS: The Census Bureau does not utilize sampling in the creation of the apportionment population count.

BY MS. SENTENO:

Q Would it be fair to say that the

Census Bureau is not aware of any way to estimate the undocumented population that is not based in whole or in part on sampling?

MR. SVERDLOV: Objection. Vague. Hold on. To the extent that this question bears upon ongoing deliberations within the Census Bureau, I'll direct the witness not to answer on the basis of deliberative process privilege.

BY MS. SENTENO:

Q Is it correct to say that if the Census Bureau were to produce immigration status data in the apportionment population count, the immigration status data would necessarily be based on estimates?

MR. SVERDLOV: Objection. I will direct the witness not to answer, and it also calls for speculation.

MS. PEARLES: Are you directing her not to answer because it calls for speculation?

MR. SVERDLOV: NO. No. I meant to say those two separate. I apologize. I'm directing her not to answer because it bears upon ongoing

deliberations and therefore is protected by the deliberative process privilege. It also calls for speculation. That's a form objection, but that's minor.

BY MS. SENTENO:

Q We talked earlier about the Census Numident file. I just want to go back to our discussion about the Numident. Would it be accurate to say the Census Numident file does not have administrative data with those persons that do not have a Social Security number or an individual taxpayer identification number?

MR. SVERDLOV: Objection. Compound.

THE WITNESS: The Numident file contains information on all Social Security numbers that have ever been assigned. So those who have not had a Social Security number assigned would not --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- would not appear in the Numident.

BY MS. SENTENO:

Q And would it be accurate, then, to say that the Census Numident file does not have administrative data for those persons who do not have an individual taxpayer identification number or Social Security number?

A The Numident would not have data for those who do not have a Social Security number. The individual taxpayer identification number comes from the Internal Revenue Service. And when individuals fill out certain forms where there's a field for Social Security number, they may use that ITIN instead of a Social Security number, but whether or not that information gets into the Numident for the ITINs in particular, I do not know.

Q Okay. So just so I understand what's in the Census Numident file, for individuals who have an ITIN -- is it correct they may or may not appear in the Census Numident depending on whether or not they have submitted an application to the Social Security Administration --

MR. SVERDLOV: Objection.

BY MS. SENTENO:

Q -- is that correct?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: I'm not sure if ITINs are in the Numident file.

BY MS. SENTENO:

Q Would it be accurate to say that the Census Bureau does not have a determination of whether the administrative records it currently has are accurate -- accurate and reliable sources of immigration status data?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: Can you say that one more time, please?

BY MS. SENTENO:

Q Yes. Would it be accurate to say that the Census Bureau does not have a determination of whether the administrative records it already has are accurate and reliable sources of immigration status data?

MR. SVERDLOV: Same objection.

THE WITNESS: The -- in terms of immigration status, the Census Bureau has worked to acquire additional administrative records, so that those records can be utilized and assessed and evaluated in conjunction with the records we already have to make that type of determination.

BY MS. SENTENO:

Q But it is correct to say that today the Census Bureau does not have a determination of whether those administrative records it does have currently are accurate and reliable sources of immigration status data?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: At this time, the Census Bureau cannot say that its current sources are accurate -- contain accurate information about immigrant status. Evaluation and research, with that purpose in mind, has to be conducted.

BY MS. SENTENO:

Q And would it be fair to say that the

Department of Homeland Security administrative data that the Census Bureau received under the memorandum of understanding, that we talked about earlier today, has not yet been determined to be accurate and reliable for the purposes of imputing citizenship or immigration status?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: The data from the Department of Homeland Security is currently undergoing evaluation to assess the quality of those data and how they might be used to help us comply with --

(Thereupon, the court reporter clarified.)

THE WITNESS: -- with the executive order.

BY MS. SENTENO:

Q But would it be correct to say that today the administrative data received from the Department of Homeland Security by the Census Bureau under the MOU has not yet been

determined to be accurate and reliable for the purpose of imputing citizenship or immigration status?

A I would say yes, that determination has not been made as of today.

Q You testified earlier about the different data that DHS has provided to the Census Bureau.

A Uh-huh.

Q Is it accurate to say that the lawful permanent resident file and naturalization data from DHS does not necessarily contain complete information on children under 18 years old, who automatically became citizens upon their parent's naturalization?

MR. SVERDLOV: Objection. Vague and argumentative.

THE WITNESS: That was documented in the David Brown paper.

BY MS. SENTENO:

Q And so is it accurate, then, to say that the LPR file and naturalization data is not complete, as it doesn't have information on

children under 18, who automatically became citizen upon their parent's naturalization?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: The Census Bureau will conduct a thorough evaluation and make that final assessment and determination.

BY MS. SENTENO:

Q So I just want to understand the feature of the database itself and what it does or doesn't contain. So is it correct that the LPR file and naturalization data from DHS doesn't have information about children under 18, who automatically became citizens upon their parent's naturalization?

A That is what has been documented in Census Bureau research in terms of our understanding, the Census Bureau would want to evaluate those data and just confirm that.

Q Would it be fair to say that the Census Bureau does not know what -- what gaps in citizenship and immigration status data exists in

the DHS administrative records provided under the MOU?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The Census Bureau would need to know, evaluate and assess what data gaps exist in those administrative records. So our evaluation will help us understand that better.

BY MS. SENTENO:

Q But is it correct to say that as of today, the Census Bureau does not know what gaps in citizenship and immigration status data exists in the DHS administrative records provided to the Bureau?

A The Census Bureau in the David Brown paper lists some data gaps in the administrative records. The Census Bureau would want to, again, evaluate the data we have recently acquired to confirm the presence of those data gaps.

Q Would it be fair to say that the Census Bureau does not how many gaps in citizenship and immigration status data exists in the DHS administrative records?

MR. SVERDLOV: Objection. Vague and argumentative. Assumes facts.

THE WITNESS: The Census Bureau in its evaluation of those data would work to identify what those gaps are.

BY MS. SENTENO:

Q But is it correct to say that today the Census Bureau does not know how many gaps there are in the administrative records from DHS?

MR. SVERDLOV: Same objection.

THE WITNESS: Without completing the evaluation, the Census Bureau would not be able to say how many data gaps exist in the data we have received from the federal agencies.

BY MS. SENTENO:

Q Earlier you testified about the driver's license data received from the state of Nebraska. And if we refer to Exhibit 13 -- my mistake. If we can refer to Exhibit 12 --

A Uh-huh.

Q -- on Page 5, it states that Nebraska has provided the Census Bureau with driver's license

data.

A Uh-huh.

Q Is the Census Bureau aware that driver's license data on immigration status is current only as of the individual's most recent visit to the driver's license office?

MR. SVERDLOV: Objection. Argumentative. Assumes facts not in evidence and misleading.

THE WITNESS: The Census Bureau, in evaluating the data from the Nebraska, would look for information connected to recency of that information that's included in the dataset.

BY MS. SENTENO:

Q And is the Census Bureau looking at recency because the Bureau understands that citizenship data within the driver's license file is only going to be -- is only going to be good as of the individual's most recent visit to the driver's license office?

MR. SVERDLOV: Objection. Vague. Argumentative. Assumes facts not in evidence.

THE WITNESS: One goal of the

Census Bureau in determining the citizen voting age population data file is to collect information for individuals from multiple sources on citizenship to assess which of those sources may have the most recent information.

BY MS. SENTENO:

Q So why is recency an important factor in the Census Bureau's analysis and evaluation of administrative records?

A So one data gap that the Census Bureau identified and talked about in the David Brown paper is that the Numident is our most reliable source of information on citizenship. However, it has been noted that there could be individuals, who applied for a Social Security number before 1972, for example, and at that time, they may not have been a citizen. And over time, their citizenship status may have changed. They could become a citizen, a naturalized citizen. But if that information was not reported to the Social Security Administration, then the Social Security Administration would not have the

accurate information about that person's citizenship status.

Q Would you agree that there are -- that there could be individuals whose last contact with the motor vehicle's department could be when they were a lawful permanent resident and they have since naturalized?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: The -- an individual's citizenship status could have changed over time, and there may be administrative records out there that reflect the former status and may not reflect the current status.

BY MS. SENTENO:

Q So would it -- and with -- with respect to what you just answered, that would include -- with data from motor vehicle's department?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: That could include any of our administrative record data sources, including motor vehicle data.

BY MS. SENTENO:

Q Ms. Battle, you earlier testified that Exhibit 13 contains the universe of administration records that you were aware the Census Bureau has requested; is that correct?

A Yes.

MR. SVERDLOV: Objection. Misleading.

BY MS. SENTENO:

Q So is it accurate to say the Census Bureau has not requested administrative records from the Executive Office of Immigration Review?

MR. SVERDLOV: Objection. Misstates prior testimony. Mischaracterizes the document.

THE WITNESS: I am not aware of the Census Bureau requesting data from the Office of Immigration Review.

BY MS. SENTENO:

Q And earlier you testified about how the Census Bureau determines whether a particular administrative record is fit for use.

A Uh-huh.

Q Is there an example of when the Census Bureau has looked at administrative data -- and it can be unrelated to the data we've been discussing today -- and decided it was not reliable enough to be used?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I cannot think of an example off the top of my head.

MR. SVERDLOV: I'll also object on the basis of scope to the prior question.

BY MS. SENTENO:

Q You testified that the Bureau analyzes or evaluates administrative records to decide whether they're fit depending on the nature of the product; is that correct?

A Uh-huh. The Census Bureau will need to assess the administrative records and determine whether those data are appropriate fit for use for whatever the intended purpose is.

Q Can you explain to me what factors the Bureau uses in its analysis or evaluation of whether a record is fit for use?

MR. SVERDLOV: Objection. To the extent -- sorry. Let me start again. Objection. I will instruct the witness to respond to this question only in general terms to protect the deliberative process privilege.

THE WITNESS: So the Census Bureau will need to take a look at the administrative records that it newly acquires, and, first of all, determine if they can read the data into your systems and make sure that the datasets contain all of the information agreed upon in the memorandum of agreement. At that point, the Census Bureau will have staff look at those data and evaluate them further and assess the variables, are they complete.

Again, depending on the purpose -- intended purpose for using those data, are the data complete enough to be able to use for whatever the intended purpose is, and there may be other things that the Census Bureau does to assess the quality of the data and how the data might be appropriately used.

BY MS. SENTENO:

Q Does the completeness of the data required for usage change depending on what the data product it will be used for is?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: It does depend on what the intended purpose is regarding how the completeness of the data may impact that -- the goal that they're trying to achieve.

BY MS. SENTENO:

Q And when the Census Bureau is assessing completeness of data --

A Uh-huh.

Q -- is it completeness of the entire dataset or certain variables within the dataset depending on the data product and the use --

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: Well, it's -- it still depends on the intended purpose and planned use for the data. If the data file is intended to help facilitate record linkages, we know that

we're going to need complete data on address, for example. And if we don't have a complete address, then that will hinder the ability to conduct appropriate record linkage.

BY MS. SENTENO:

Q So going back to Exhibit 13, which you have in front of you, which of these records contain information that would reflect whether or not an individual is undocumented?

A We would need to take a look at the variable lists associated with these memorandums of understanding and -- even at that point, without having a code book or data dictionary, it may not be possible to determine right here if there are any variables that will help with the identification of the undocumented.

Q So then sitting here today looking at this chart in front of us, is it correct to say that you cannot identify a dataset here that would reflect whether or not an individual is undocumented?

MR. SVERDLOV: Objection. Misstating.

THE WITNESS: Without consulting the memorandums of understanding and perhaps even, again, a code book and variable description, I cannot tell you, sitting here, which of these datasets may have information pertaining to those who are undocumented.

BY MS. SENTENO:

Q Could you tell me where we would find the code book for the -- did you say it was variable descriptions --

A Uh-huh.

Q -- which would assist with determining whether any of these datasets would reflect whether a person -- whether an individual is undocumented or not?

A I do not know if these federal agencies make that information publically available or not, but that information would have to be shared with the -- the Census Bureau.

Q Would you agree with me that the Census Bureau does not rely exclusively on administrative records to enumerate the total

population for the apportionment population count?

A The Census Bureau does not rely exclusively on the administrative records to enumerate the population for the apportionment population count.

Q Would it be fair to say that in order to determine the undocumented immigration population in each state, the Census Bureau would need to impute citizenship, legal noncitizens and undocumented immigrant status for every person residing in the U.S.?

MR. SVERDLOV: Objection. Vague and compound.

THE WITNESS: The Census Bureau at this time does not know how it would develop estimates of the undocumented at the state level. We need to first finish our evaluation of the data we have acquired and then assess how that data may be used to help us meet the executive order.

BY MS. SENTENO:

Q Would it be accurate to say that in order to impute citizenship, legal non-U.S. citizen or

undocumented immigrant status, the Census Bureau would need to use administrative records for every person in the U.S.?

MR. SVERDLOV: Objection. Vague and compound. And I'm actually going to direct the witness not to answer on grounds of deliberative process privilege.

BY MS. SENTENO:

Q And would you agree with me that if the Bureau relied only on administrative records to produce the apportionment population count, that would not be an enumeration, but rather something other than an enumeration?

MR. SVERDLOV: Objection. Calls for speculation. Calls for legal conclusion.

THE WITNESS: Could you, please, state that one more time?

BY MS. SENTENO:

Q Yeah. Would you agree with me that if the Bureau relied only on administrative records to produce the apportionment population count, that would not be an enumeration, but rather

something else, something other than an enumeration?

MR. SVERDLOV: Same objection. And also object on the grounds it's misleading.

THE WITNESS: I do not know if conducting a decennial census using all administrative records would or would not meet the criteria for conducting an enumeration of the population.

BY MS. SENTENO:

Q Would it be fair to say that if the Bureau relied on administrative record data to impute a characteristic to every person in the apportionment population count, that would be different from the Census Bureau's anticipated plans to use administrative records for limited purposes in the 2020 census?

MR. SVERDLOV: Objection.

THE WITNESS: I will need you to --

MR. SVERDLOV: Vague -- sorry. Vague and compound.

THE WITNESS: I will need you to repeat that, please.

BY MS. SENTENO:

Q Would it be fair to say that if the Bureau relied on administrative data to impute a characteristic to every person in the apportionment population count, that would be different from the Census Bureau's anticipated plans to use administrative records for limited purposes in the 2020 census?

MR. SVERDLOV: Same objection. Calls for speculation.

THE WITNESS: The Census Bureau -- in terms of using administrative records to impute missing information, the Census Bureau strives to collect reported data and the use of imputation for missing characteristics has typically been limited to about -- for the basic 100 percent items on the decennial form to about three to five percent of the population.

BY MS. SENTENO:

Q And do those reflect your plans under the 2020 census?

A For the 2020 census, when it comes to the

use of administrative records to impute missing characteristics like age, sex, race, and Hispanic origin, the idea is that the level of imputation is not expected to exceed what there was in 2010. So, again, having imputation in general for missing characteristics, be it from administrative record or from the nearest neighbor, we are not expecting that to exceed more than what was discovered in 2010, which is three to five percent of the population.

Q Would it be correct to say that there will not be a question regarding immigration status on the 2020 decennial census form?

A Yes.

Q And would it be correct to say that the Bureau will not use administrative records to impute noncitizen immigration status to the population in the decennial census?

MR. SVERDLOV: I will direct the witness not to answer on the basis of deliberative process privilege.

BY MS. SENTENO:

Q Is it correct that in the 2010 census the Census Bureau used administrative records for count imputation for less than one-half percent of addresses?

MR. SVERDLOV: Objection.

THE WITNESS: That information should be available on our website. I don't know the number off the top of my head.

(Exhibit 17, Andrew Keller report, was marked.)

BY MS. SENTENO:

Q Ms. Battle, I've handed you what's been marked Exhibit 17.

A Uh-huh.

Q Have you seen this document before?

A I do not recall this specific document.

Q And can you tell me who the author Andrew Keller is?

MR. SVERDLOV: Objection to foundation. I'm sorry. I misheard your question. I withdraw the objection.

THE WITNESS: Yes. Andrew Keller is an

employee at the U.S. Census Bureau and focuses his research on imputation.

BY MS. SENTENO:

Q And would this be one of the reports that might have the information about the rate of imputation for the count in 2010?

MR. SVERDLOV: Now I'm going to object on the basis of foundation.

THE WITNESS: I see in the abstract that this document states that the count imputation procedure filled in housing unit status and size for the small proportion of addresses, less than one-half percent, where this information was unknown.

BY MS. SENTENO:

Q Does that refresh your recollection?

A I defer to Andrew Keller's research. He's the expert in this information.

Q And so I just want to understand -- I just want to understand a bit more about when imputation is used. Is it correct and -- and when administrative records are used.

So is it correct that administrative records are used in the decennial census only to assist with nonresponse follow-up enumeration, imputation and editing?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Administrative records are also used in the group quarters enumeration, where the Census Bureau may work with a point of contact at a prison, for example, or a nursing home and will pull information from their administrative records to have a list of residents and their demographic characteristics.

BY MS. SENTENO:

Q And so it would -- are there any other uses for which administrative records would be used in the enumeration?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: For 2020, we are also planning to use administrative records to enumerate the deployed military, who are overseas on census day. We are going to count the deployed

military at their usual residence in the United States; meaning, they would be part of the resident population. So we need and are working to get from the Department of Defense address information and demographic characteristics, so that we can include those individuals in local community-level statistics.

BY MS. SENTENO:

Q So would it be correct to say that for the 2020 enumeration, the Census Bureau will only use administrative records to assist with nonresponse follow-up enumeration, imputation, editing, enumerating group quarters and enumerating the deployed military; is that correct?

MR. SVERDLOV: I'm actually going to object to this question.

(Thereupon, the court reporter clarified.)

MR. SVERDLOV: Fun game I play.

I'm going to object on the basis of deliberative process privilege and direct the

witness not to answer this question further -- this question further.

Just for the record, the fun game I play statement was the fact I was covering the mic inadvertently.

MS. SENTENO: I just want to get some clarification because the point of this question is to understand the 2020 decennial census process.

MR. SVERDLOV: Yes. And that's -- that is where I thought you were going, but the formulation of the question gave me -- gave me concern.

MS. SENTENO: So let me rephrase it.

MR. SVERDLOV: Yeah.

BY MS. SENTENO:

Q So with respect to the 2020 decennial census enumeration, the Census Bureau will only use administrative records to assist with nonresponse follow-up enumeration, imputation, editing, the enumeration of group quarters and the enumeration of deployed military; is that correct?

MR. SVERDLOV: So that does not cure my concerns, so I will continue directing the witness not to answer. I will be happy to discuss it if you want to go off the record for a second.

MS. SENTENO: Yes, why don't we.

MR. SVERDLOV: Okay.

VIDEOGRAPHER: We're going off the record. The time is 5:10 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 5:12 p.m.

MR. SVERDLOV: So for the record, I withdraw that objection. I had misunderstood the question that was being asked.

MS. SENTENO: Could you read back the last question, please?

(Thereupon, the reporter read the record as requested.)

THE WITNESS: I would have to defer to the operational plan. The plan lays out the -- all of the operations. And if there is an expectation to use administrative records for that

particular operation, it should be reflected there, above and beyond what we've already talked about.

BY MS. SENTENO:

Q For what percentage of the population does the Census Bureau anticipate it will need to use administrative records to enumerate households in the nonresponse follow-up process for the 2020 census?

A I do not know if there are estimates of how many housing units we are expecting to enumerate using administrative records from nonresponse follow-up.

Q Would that be in the 2020 operational plan?

A An estimate of how many housing units would be enumerated using administrative records from the nonresponse follow-up operation, if that number exists, then I would think that would be in a research paper or a paper that documents testing and research that has been done over the decade to produce those types of estimates.

Q Does the Census Bureau have a projection for what percentage it may need to use administrative records to impute a count for -- to impute a count for households in the 2020 census?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: If that estimate exists, then it would likely be in documentation regarding research and testing that was done regarding the percent of households that would need a count imputation.

BY MS. SENTENO:

Q And would information about the percentage of the population that the Census Bureau projects, it might need to use administrative records to impute can characteristics for individuals in the 2020 census exist?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I do not know if a projection exists in terms of what percent of individual records would need to be imputed by -- to have administrative records available to impute

missing characteristics.

BY MS. SENTENO:

Q Why does the Census Bureau use administrative records in the decennial census to impute count or characteristic data only after it has tried to solicit a self-response in an attempt to conduct a nonresponse follow-up?

A Could you, please, repeat that?

Q The Census Bureau uses administrative records in the decennial census to impute count or characteristic data only after the Census Bureau tries to solicit a self-response or attempted to conduct some sort of nonresponse follow-up; is that right?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: For housing units that are part of the self-response areas, if we are not able to collect data from respondents, the Census Bureau will assess if -- also consider if proxy interviews are possible where they will perhaps talk with a neighbor or someone else who is knowledgeable about that address to try to

obtain information about that address. If the Census Bureau, again, does not have information from a housing unit, one strategy it may use to try to provide the characteristics or count may be using administrative records.

BY MS. SENTENO:

Q So imputation comes at the end after the Census Bureau has tried to solicit information via self-response or proxy or through nonresponse follow-up; is that correct?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: For item nonresponse, after the census has -- after data has been collected, and we still have records where values are missing for certain characteristics, then those records would go through our editing and imputation procedure for items. And, at that time, the Census will, then, use a number of different approaches to try to fill in those missing items. And one approach may be administrative records. Another approach may be looking within the

household to see if it can use other data from other household members. Another approach is using the hot deck imputation methodology where you're looking to your nearest neighbor to provide information.

BY MS. SENTENO:

Q Is it accurate to say that self-response is more accurate than imputation as a general matter?

MR. SVERDLOV: Objection. Vague. Calls for speculation.

THE WITNESS: The Census Bureau's goal is to collect data via self-response, be it through someone completing a questionnaire on their own or be it an enumerator interviewing a member of the household to collect the information.

BY MS. SENTENO:

Q And that's because it's generally considered better information; is that right?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: We strive to have

respondents report their information to us. For example, when it comes to race and ethnicity, that is the -- we tell individuals we need you to identify -- explain to the Census Bureau or share information with the Census Bureau by answering our race question, where we are asking the respondent to identify their race, based on their -- on how they self-identify.

BY MS. SENTENO:

Q Would it be fair to say that the Census Bureau does not have the amount of administrative data necessary to use imputation at a large scale for the decennial census?

MR. SVERDLOV: Objection. Vague and misleading. Calls for speculation.

THE WITNESS: I -- I don't have information that can answer that.

MR. SVERDLOV: Are you okay? Do you need a break?

THE WITNESS: Maybe just five minutes.

VIDEOGRAPHER: Going off the record at 5:23 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time is 5:35 p.m.

BY MS. SENTENO:

Q Ms. Battle, we just talked about how the Census Bureau in 2010 -- in the 2010 census imputes -- or conducts count imputation for less than one-half percent of the addresses.

Is there a reason why the Census Bureau does not use imputation on a more wide scale?

MR. SVERDLOV: Objection. Assumes facts not in evidence and mischaracterizes prior testimony.

THE WITNESS: The Census Bureau uses count imputation when it's -- when it's necessary.

BY MS. SENTENO:

Q And when is it necessary?

A The particular paper talks about the fact that count imputation is utilized during the nonresponse follow-up operation when information was not known about the status of a particular household, and the status of the housing unit as

well as the size.

Q Is there a reason why the Census Bureau conducts the decennial census by first relying on self-response for most of the population? I do understand that in some instances the enumerators are used first as the method to count the population.

A Well, that is the preferred approach by which to obtain data.

Q Why is it preferred?

A Because we are obtaining that information directly from the respondents to communicate their characteristics.

Q And what is the value of obtaining the information directly from the respondents?

A The value is that we are enumerating the population, and so our goal is to collect that data from the population.

(Thereupon, the court reporter clarified.)

BY MS. SENTENO:

Q Does it tend to be more accurate when you

collect that information directly from the population, as you said?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: That is the preferred way to collect the data from the population.

BY MS. SENTENO:

Q Would it be fair to say that imputing count or information on a larger scale than what is done presently could comprise -- could compromise the accuracy of the data?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: Could you repeat that one more time, please?

BY MS. SENTENO:

Q Would it be fair to say that imputing count or characteristic data on a larger scale could compromise the accuracy of the data?

MR. SVERDLOV: Excuse me. Objection. Vague. Misleading. Calls for speculation.

THE WITNESS: The Census Bureau statistical quality standards does include

discussion about when a dataset might have serious data quality issues. And one indicator that the quality standards notes is that the dataset may have serious quality concerns if key -- key items that you're collecting data for have a response rate of less than 70 percent.

BY MS. SENTENO:

Q I just want to be sure I understood what the quality standards say about the collection of data. So if I understand you correctly, would it be fair to say that data collections with low self-response rates raise concerns about the accuracy of that data collection?

MR. SVERDLOV: Objection. Vague and misleading.

THE WITNESS: For an item on the decennial census form, for example, or in a current survey, the American Community Survey, for example, if we are seeking information from the sample or for respondents to provide us that information, during our enumeration or during our collection of survey data, and the quality

standards say that for a key item, if the level of response falls below 70 percent, that that may be an indicator of serious quality concerns for that particular data.

BY MS. SENTENO:

Q And what is a key item?

A That is not defined in the quality statistical standards, and it would really be for the person preparing those data to -- to assess that.

Q So if a dataset were to be used for a particular purpose that -- where it -- where it was important to have accuracy of a particular variable --

A Uh-huh.

Q -- would that perhaps make a specific variable like age the key factor if age was important to the data product?

MR. SVERDLOV: Objection. Compound.

THE WITNESS: The Census Bureau does not define what a key statistic is, but a key item could be an available where it is central to the

data product that you are trying to produce.
BY MS. SENTENO:
Q And so if the key product is central to the data product you want to produce --
A Uh-huh.
Q -- and that key products -- is "key product" the right term? Sorry we --
A The key -- there's a "key item" --
Q Key items.
A -- that's central to the data product you want to produce.
Q So if that key item is central to the data product one would want to produce, if that key item has a low self-response rate, it's fair to say that it could raise serious concerns about that data product's accuracy?
MR. SVERDLOV: Objection. Argumentative.
BY MS. SENTENO:
Q Or I'm sorry. The key item's accuracy?
MR. SVERDLOV: Same objection.
THE WITNESS: The quality standards do say that one particular indicator of serious data

quality concerns could be if your key items for you data product have a response rate that's -- that falls below 70 percent. So the flip side of that is that the nonresponse is higher.

BY MS. SENTENO:

Q What percent of the apportionment population count does federally-affiliated overseas comprise -- comprise? Apologies.

A I do not have the exact percentage off the top of my head, but we do know from our publications that the apportionment population count was for -- for the federally-affiliated overseas portion, it was 1,042,000 people.

Q Would it be fair to say that the number of people, who are counted through the federally-affiliated overseas program, is relatively small when compared to the apportionment population count total?

A The federally-affiliated count overseas tends to be a small proportion of the overall apportionment population count.

Q Would you agree with me that

Census Bureau methodology for the decennial census operations were typically developed years in advance of the decennial census date?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: Decennial census operations, the development of those operations, the testing, research behind those operations takes place throughout the decade.

BY MS. SENTENO:

Q Is the -- is the Bureau's plan to assign a probability of being undocumented to individuals in the 2020 census?

MR. SVERDLOV: Objection. I'm going to direct the witness not to answer on the basis of the deliberative process privilege.

BY MS. SENTENO:

Q Earlier you testified that the Bureau will use a statistical model to assign a probability of U.S. citizenship to individuals.

A Uh-huh.

Q Would it be correct to say that this means the Bureau will estimate U.S. citizenship as

opposed to enumerate U.S. citizenship in the 2020 census?

MR. SVERDLOV: Objection. Argumentative and calls for a legal conclusion.

THE WITNESS: The citizenship voting age population data product will include estimates.

BY MS. SENTENO:

Q Would it be possible for the Census Bureau to produce a data product that assigns a probability of U.S. citizenship to individuals that doesn't rely on estimates?

MR. SVERDLOV: Objection.

THE WITNESS: Could you repeat that, please?

MS. SENTENO: Could you read back the last question?

(Thereupon, the reporter read the record as requested.)

MR. SVERDLOV: I'm going to direct the witness not to answer on the basis of deliberative process privilege.

BY MS. SENTENO:

Q If I understood your earlier testimony correctly, you said that a statistical model that assigned a probability of U.S. citizenship to individuals is an estimate; is that correct? Did I have that right?

A Those will be estimates.

Q And would that answer also apply to an effort by the Census Bureau to assign immigration status to individuals in the 2020 census?

MR. SVERDLOV: I'm going to object on the basis this mischaracterizes prior testimony and calls for a legal conclusion.

THE WITNESS: The Census Bureau at this time does not know what methodology it would utilize to try to comply with the executive order in terms of producing estimates of the undocumented population.

BY MS. SENTENO:

Q But a statistical model to assign a probability of immigration status to individuals in the 2020 census would be an estimate, correct?

MR. SVERDLOV: Objection.

Mischaracterizes prior testimony.

(Thereupon, the court reporter clarified.)

MR. SVERDLOV: And misleading.

THE WITNESS: Could you state that one more time, please?

BY MS. SENTENO:

Q Uh-huh. Is it fair to say that a probability by definition is an estimate?

MR. SVERDLOV: Objection. Vague and calls for speculation.

THE WITNESS: You could characterize a probability as an estimate.

BY MS. SENTENO:

Q Could you characterize a probability as something else?

A I don't know that off the top of my head.

Q So if the Bureau -- so if -- withdrawn.

Would it be correct to say that the Census Bureau has not prepared -- it has not prepared to establish and implement a methodology to impute citizenship or immigration status to

every person in the 2020 decennial census?

MR. SVERDLOV: Objection. Vague. Compound and misleading.

THE WITNESS: I'll need you to repeat that again.

BY MS. SENTENO:

Q Uh-huh. Would it be correct to say the Census Bureau has not prepared, as of today, to establish and implement -- or is not prepared as of today to establish and implement a methodology to impute citizenship or immigration status to every person in the 2020 decennial census?

MR. SVERDLOV: I'm going to object on the basis it's vague, compound and misstating. And also because it bears upon ongoing deliberations, I will instruct the witness to only answer in general terms.

THE WITNESS: The Census Bureau's methodology has not been finalized.

BY MS. SENTENO:

Q So, as of today, the Census Bureau is not prepared to establish and implement a methodology

to impute citizenship or immigration status to every person in the 2020 decennial census; is that right?

MR. SVERDLOV: Same objection and same instruction.

THE WITNESS: The Census Bureau has not finalized a methodology to produce that information, as of today.

BY MS. SENTENO:

Q So then the answer is yes, the Census Bureau, as of today, is not prepared to establish and implement a methodology to impute citizenship or immigration status to every person in the 2020 decennial census; is that right?

MR. SVERDLOV: Objection. Misleading.

THE WITNESS: The Census Bureau, as of today, has not finalized a methodology.

BY MS. SENTENO:

Q Ms. Battle, are you familiar with the methodology referred to as the "residual method"?

A Yes.

Q Could you describe what the residual

method is?

A The residual method is a method that the Census Bureau has used in the past to produce estimates of the undocumented immigrant population, where the Census Bureau took an estimate of the foreign-born population and then subtracted from that aggregate data regarding lawful permanent residents, naturalized citizens, refugees, asylees, temporary migrants, and the balance, the difference, was estimated to reflect the undocumented immigrant population.

Q And would you agree with me that the Census Bureau does not use the residual method to create the apportionment population count?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: The residual method is not utilized to develop the apportionment population count.

BY MS. SENTENO:

Q Would it be accurate to say that the Census Bureau does not have plans to explore the use of their residual method to estimate the

undocumented immigrant population in each of the 50 states?

MR. SVERDLOV: I'm going to direct the witness not to answer on the basis of deliberative process privilege.

BY MS. SENTENO:

Q Would it be correct to say that the Census Bureau has not studied whether it would be able to estimate the undocumented immigrant population using the residual method for the apportionment population count?

MR. SVERDLOV: I'm going to object to that as vague.

THE WITNESS: Could you, please, restate that?

BY MS. SENTENO:

Q Would it be correct to say that the Census Bureau has not studied whether it would be able to estimate the undocumented immigration population using the residual method for the apportionment population count?

MR. SVERDLOV: I'm going to make the same

objection. And I'm also going to say because it bears on ongoing developments with methodologies, I will direct the witness to only answer in general terms.

THE WITNESS: The Census Bureau, at this time, is still evaluating and assessing the administrative records that have been recently acquired. And when that evaluation is complete, then Bureau can start to think through how that data may be utilized to help us comply with the executive order. So methodologies and decisions about which methodologies to utilize have not been -- been completed yet.

BY MS. SENTENO:

Q Would it be accurate to say that the Census Bureau is not aware of any way to currently -- currently estimate the undocumented immigrant population in each state, other than the residual method?

MR. SVERDLOV: I'm going to instruct the witness not to answer on the basis of deliberative process privilege.

MS. SENTENO: So the intent of the question is really just to understand from a factual basis what methodology the Census Bureau --

MR. SVERDLOV: Yeah.

MS. SENTENO: -- is aware exists.

MR. SVERDLOV: Yes. We view -- please finish.

MS. SENTENO: So it's really not about the deliberations in this instance of what the Bureau may or may not decide to do when it assesses a methodology, but rather is the Census Bureau aware of other methodologies.

MR. SVERDLOV: So I understand the premise from which you're starting. And I think the problem is you're starting from an incorrect premise. Because part of the deliberations may or may not involve the development of a methodology. So the Bureau's awareness of methodologies would be, in fact, what we view as the core of the deliberative process privilege.

MS. SENTENO: I'm sorry. So is the issue

they may potentially be aware of a methodology that is not yet been developed and because that's part of their current deliberations --

MR. SVERDLOV: The current deliberations seek to determine methodologies. And I try, as I might, I cannot parse the questions that you pose in a way that would not get to the substance of those deliberations, and that is the basis for why I'm directing the witness not to answer.

MS. SENTENO: Let me try another question and --

MR. SVERDLOV: Okay.

BY MS. SENTENO:

Q Ms. Battle, you testified earlier that the Census Bureau has studied and produced an estimate of the undocumented population based on the residual method.

A Uh-huh.

Q Has the Census Bureau produced an estimate of the undocumented immigration population not using the residual method?

MR. SVERDLOV: Objection. Vague.

THE WITNESS: I am not aware of the Census Bureau producing any estimates of the undocumented population.

(Thereupon, the court reporter clarified.)

THE WITNESS: I am not aware of the Census Bureau producing any estimates of the undocumented population that did not utilize the residual method that I described earlier.

BY MS. SENTENO:

Q Will the Bureau attempt to alter the apportionment population by excluding the undocumented immigrant population from the apportionment population count?

MR. SVERDLOV: I'm going to direct the witness not to answer on the basis of deliberative process privilege.

MS. SENTENO: Can we take a five-minute break?

VIDEOGRAPHER: We're going off the record at 6:03 p.m.

(Off the record.)

VIDEOGRAPHER: We are back on the record. The time is 6:15 p.m.

THE WITNESS: There's one statement that I made earlier that I would like to clarify. Earlier in the day, I stated that the Census Bureau first produced its citizen voting age population data product in 2011, and that was not correct. The Census Bureau first produced that data product in 2002.

MS. SENTENO: Thank you for that clarification.

We have no further questions today.

MR. SVERDLOV: Good. Ms. Battle, I have no questions for you today. We will reserve the right to read and sign the transcript. And with that, I have nothing further. Thank you very much.

VIDEOGRAPHER: This marks the end of the deposition. The time is 6:16 p.m.

(Whereupon, at 6:16 p.m., the deposition of KAREN BATTLE was concluded.)

* * * * *

CERTIFICATE OF REPORTER

I, KAREN LYNN JORGENSON, RPR, CSR, CCR the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that the said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



KAREN LYNN JORGENSON, RPR, CSR, CCR

Dated this 3rd day of March, 2020.

Alexander Sverdlov

asvedlov@usdoj.gov

March 3, 2020

State Of Alabama, Et Al v United States Dept Of Commerce, Et Al

3/2/2020, Karen Battle (#4000597)

The above-referenced transcript is available for review.

Within the applicable timeframe, the witness should read the testimony to verify its accuracy. If there are any changes, the witness should note those with the reason, on the attached Errata Sheet.

The witness should sign the Acknowledgment of Deponent and Errata and return to the deposing attorney. Copies should be sent to all counsel, and to Veritext at cs-ny@veritext.com

Return completed errata within 30 days from receipt of testimony.

If the witness fails to do so within the time allotted, the transcript may be used as if signed.

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State Of Alabama, Et Al v United States Dept Of Commerce, Et Al

Karen Battle (#4000597)

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Karen Battle Date

State Of Alabama, Et Al v United States Dept Of Commerce, Et Al

Karen Battle (#4000597)

ACKNOWLEDGEMENT OF DEPONENT

I, Karen Battle, do hereby declare that I have read the foregoing transcript, I have made any corrections, additions, or changes I deemed necessary as noted above to be appended hereto, and that the same is a true, correct and complete transcript of the testimony given by me.

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Karen Battle Date

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	Case No. 2:18-cv-00772-RDP ORAL ARGUMENT REQUESTED

DEFENDANTS' MOTION TO DISMISS

Defendants United States Department of Commerce, Wilbur L. Ross, Bureau of the Census, and Ron S. Jarmin ("Defendants"), by and through their undersigned counsel, hereby move to dismiss the Complaint in this case pursuant to Federal Rule of Civil Procedure 12(b)(1). The grounds for this motion are set forth at length in the accompanying Memorandum of Law in Support of Defendants' Motion to Dismiss. Defendants request oral argument on this motion.

Dated: November 13, 2018

Respectfully submitted,

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N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 2:18-cv-00772-RDP
UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs the State of Alabama and Representative Mo Brooks challenge the Census Bureau's practice of counting all persons who are residing in a state at the time of the census, regardless of immigration status. In particular, Plaintiffs challenge the inclusion of illegal aliens in the decennial census for apportionment purposes for both the House of Representatives and the Electoral College. This Court, however, need not reach the merits of whether the Census Bureau should exclude illegal aliens from the census because Plaintiffs lack standing to bring this lawsuit. *See* Fed. R. Civ. P. 12(b)(1).

Plaintiffs allege that including illegal aliens in the census will result in Alabama losing a congressional seat and one Electoral College vote. Plaintiffs, however, have failed to demonstrate—even at the pleading stage—that the inclusion of illegal aliens would actually result in this injury. The very purpose of the census—an event that will not even take place until 2020—is to count the number of people residing in each state. Because that count will provide the basis for apportionment of representatives across all 50 states (and Electoral College votes across those same states and the District of Columbia), Plaintiffs would need to account for the impact of excluding illegal aliens in all of the states. That is all but impossible to do because the census has not yet taken place, thus making their claimed injury speculative, conjectural, and hypothetical. As a fallback, Alabama alleges that it is likely to lose funding if illegal aliens are included in the census, but that claimed injury is just as speculative as its claimed loss of representation because it relies upon the same type of prediction as to what the census will yield. And in any event, Alabama's alleged financial injury falls outside the zone of interests protected by the Constitution's Census Clause, thus precluding prudential standing to pursue relief for any such injuries.

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For these reasons, there simply is no case or controversy that would justify having this Court wade into the constitutional and other claims raised by Plaintiffs' lawsuit. Accordingly, and as set forth in more detail below, this Court should dismiss Plaintiffs' Complaint for lack of jurisdiction.

BACKGROUND

I. The Constitution's Census Clause, the Fourteenth Amendment, Enabling Legislation, and the Census Bureau's Residence Criteria

The Constitution requires the federal government to conduct a decennial census to apportion Representatives in Congress among the states. Article I, Section 2, Clause 3 of the Constitution provides that "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, . . . excluding Indians not taxed, three fifths of all other Persons." After the abolition of slavery, that rule was modified by the first sentence of Section 2 of the Fourteenth Amendment, which reads: "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." Each State's number of representatives, together with its two Senators, also determines the number of electors for President and Vice President in the Electoral College. *See* U.S. Const. art. II, § 1, cl. 2.

To determine the whole number of persons in each State, the Constitution provides that a census shall be taken every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. Congress, in turn, has implemented that requirement by directing the Secretary of Commerce every ten years to take a census of the "total population." 13 U.S.C. §§ 141(a) and (b). The Census Bureau assists the Secretary of Commerce in the performance of this responsibility. *See* 13 U.S.C. §§ 2, 4. After the census is taken, congressional seats are

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distributed pursuant to "the method of equal proportions," a complex process that ranks states in order of priority based on their populations (multiplied by a multiplier). *See* 2 U.S.C. § 2a(a); *see generally U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992).

Pursuant to the criteria promulgated by the Census Bureau, most people are counted "at their usual residence, which is the place where they live and sleep most of the time." Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018) ("Residence Rule" or "Residence Criteria").[1] According to these criteria, "[c]itizens of foreign countries living in the United States," including foreign citizens living here illegally, are "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.*[2]

II. Allegations of Plaintiffs' Complaint

Plaintiffs consist of the State of Alabama and Congressman Mo Brooks, who currently represents Alabama's 5th Congressional District. *See* Compl. ¶¶ 1, 2, ECF No. 1. Alabama asserts that it "has a cognizable interest in its own right in representation in the House of Representatives and the Electoral College." Compl. ¶ 1. Representative Brooks alleges that he is a "registered voter in the State of Alabama" and that "[t]he Congressional district he represents will be disrupted by a reapportionment that accounts for illegal aliens and his vote will be diluted." Compl. ¶ 2.

Plaintiffs allege that the inclusion of illegal aliens will redistribute congressional seats and Electoral College votes from states that have comparatively fewer illegal alien residents to those that have a comparatively larger illegal alien resident population. *See* Compl. ¶¶ 29-72.

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[1] There are a few exceptions. For example, people in certain types of group facilities are counted at those facilities. And people who do not have a usual place of residence (such as homeless individuals) are counted "where they are on Census Day." 83 Fed. Reg. at 5533.

[2] Citizens of foreign countries who are members of the diplomatic community are counted at the embassy, consulate, United Nations facility, or other residence where the diplomats live. Citizens of foreign countries who are merely visiting the United States, however, are not counted in the census. *See id.*

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The State of Alabama also alleges that it will lose federal and other funding on a comparative basis as a result of the inclusion of illegal alien residents in the census. *See* Compl. ¶¶ 73-86. All of these allegations of harm are based on the "estimated" impact of including illegal aliens in the census count. Compl. ¶ 51.

Plaintiffs' Complaint presents five causes of action. Count I alleges that the inclusion of illegal aliens in the census violates the Equal Protection Clause of the Fourteen Amendment to the extent illegal aliens will be included for purposes of congressional apportionment. Count II alleges that the inclusion of illegal aliens violates the Equal Protection Clause of the Fourteenth Amendment and Articles I and II of the Constitution to the extent illegal aliens will be included for purposes of allocating Electoral College votes. Count III alleges that the inclusion of illegal aliens in the census count violates the Constitution's requirement of an "actual enumeration" of the number of persons in each state. Count IV alleges that the Residence Rule is arbitrary and capricious under the APA because the Census Bureau allegedly failed to explain why it was including illegal aliens in the census count. Finally, Count V alleges that the Residence Rule is unlawful under the APA because Plaintiffs believe that illegal aliens should be excluded from the census count. Plaintiffs seek declaratory relief, including a vacatur of relevant portions of the Residence Rule, but do not identify how the Census Bureau should actually go about excluding illegal aliens from the census.

LEGAL STANDARDS

A plaintiff must establish a court's jurisdiction through sufficient allegations to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991)

(internal quotation marks and citations omitted). "[A] motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be based upon either a facial or factual challenge to the complaint." *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). "Facial attacks on the complaint 'require the court merely to look and see if [the] plaintiff has successfully alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

ARGUMENT

The possession of constitutional standing under Article III requires that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[A]t an irreducible minimum" the doctrine of standing requires that a plaintiff must establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent; (2) a causal connection between the injury and the defendant's challenged conduct, such that the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defs. of Wildlife*, 504 U.S. at 560-61. A court must dismiss a claim for lack of subject matter jurisdiction if the plaintiff fails to establish each of these elements of standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982) ("Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States."). Rigorous application of standing requirements is appropriate where, as here, a party seeks to have a court invalidate on

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constitutional grounds the acts of a co-equal Branch of government. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46; *Valley Forge Christian Coll.*, 454 U.S. at 472-73.

As the party invoking federal jurisdiction, plaintiffs bear the burden of establishing the required elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Defs. of Wildlife*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* However, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002); *see also FW/PBS. Inc. v. Dallas*, 493 U.S. 215, 231 (1990) ("[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' . . . 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" (citation omitted)).

Plaintiffs in this case have not met this burden. Plaintiffs allege that the State of Alabama will lose congressional and Electoral College representation as a result of the inclusion of illegal aliens in the census. That injury is entirely speculative, thus precluding standing on that basis by either Alabama or Representative Brooks, who alleges injury as a voter in his congressional district. Nor can the State of Alabama point to any actual or imminent injury relating to the loss of funds, which is every bit as speculative as the alleged injury deriving from a loss of representation. And even if Alabama could demonstrate an injury relating to the loss of funding, any such injury falls outside the zone of interests protected by the Enumeration Clause.

I. Plaintiffs' Congressional Representation and Electoral College Injuries Are Too Speculative to Confer Standing

Plaintiffs' first asserted injury is that the government's failure to exclude resident illegal aliens from the census will result in a dilution of Plaintiffs' representation in the House of

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Representatives and in the Electoral College. *See* Compl. ¶ 50. A plaintiff cannot establish standing to challenge a census practice, however, based on that practice's alleged effect on the apportionment of representatives, unless it can show that using its preferred census practice would have caused the state to gain an additional representative. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the plaintiffs claimed (*inter alia*) that the apportionment was inaccurate because the decennial census had allocated overseas federal employees to particular states based on inaccurate data. But because the plaintiffs had not "shown . . . that Massachusetts would have an additional Representative if the allocation had been done using some other source of 'more accurate' data," they "d[id] not have standing to challenge the accuracy of the data." *Id.* at 802 (plurality opinion).

The Complaint here concedes that Plaintiffs cannot show that the exclusion of illegal aliens from the census would result in Alabama's gaining an additional representative. Plaintiffs merely assert that including illegal aliens "will *likely* result" in a loss of representation. Compl. ¶ 50 (emphasis added). That allegation alone reveals that Plaintiffs fall far short of demonstrating an "injury in fact" that is "concrete and particularized," *Defs. of Wildlife*, 504 U.S. at 560 (citations omitted), and not "merely 'conjectural or 'hypothetical' or otherwise speculative." *Summers v. Earth Island Inst.*, 555 U.S. 488, 505 (2009) (quoting *Defs. of Wildlife*, 504 U.S. at 560); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (alleged future injury must be '*certainly impending*"; "'[a]llegations of *possible* future injury' are not sufficient" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))).[3]

[3] Indeed, Plaintiffs purport to support this contention only with bare assertions that do not support a plausible inference of injury. For example, Plaintiffs allege that the illegal alien population is unevenly distributed in the United States, Compl. ¶¶ 33-36, but do not plausibly allege how any such uneven distribution affects Alabama in comparison to other states, *see id.* ¶¶ 42-45. Instead, Plaintiffs offer only the bare assertion that counting illegal aliens will cause "the size of Alabama's congressional delegation [to] fall." *Id.* ¶ 56.

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Moreover, the process of apportionment itself makes any pre-census allegations as to the distribution of representatives (and, therefore, electors) speculative. That process determines each state's representation in the House of Representatives and Electoral College by ranking states in order of priority based on population. *See* 2 U.S.C. § 2a(a); *see generally U.S. Dep't of Commerce*, 503 U.S. at 461. Thus, each state's representation will depend not just on its own population, but on the population of other states as well. Plaintiffs allege that any future injury of lost representation "can be accurately measured by removing the estimated illegal alien population from each state's projected total population and recalculating the allocation of seats in the House of Representatives using the method of equal proportions." Compl. ¶ 51. Plaintiffs fail to explain how they identify the "estimated illegal alien population" (other than cite estimates that are now several years old, *see* Compl. ¶ 30, if not older, *see* Compl. ¶¶ 39-40), much less account for the fact that the apportionment is sensitive to even very small population shifts, *see Wisconsin v. City of New York*, 517 U.S. 1, 11-12 (1996) (citing reasons why the Secretary decided not to statistically adjust the 1990 census); *Ridge v. Verity*, 715 F. Supp. 1308, 1320 (W. D. Pa. 1989); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 570 n.10 (D.D.C. 1980), and hence would be sensitive to small inaccuracies in estimates as well. And because the apportionment process is based on the population of every state, Plaintiffs' method requires population projections for all residents, regardless of legal status, for *every* state in the year 2020, even though 1) the 2020 census has not yet taken place; and 2) state populations will continue to change between now and 2020. It is therefore impossible to "accurately measure" the population before the actual measurement. Instead, it would be "sheer speculation as to the identities of the states that will be affected by the inclusion of illegal aliens in the census count for purposes of apportionment." *Ridge*, 715 F. Supp. at 1318; *see also*

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Sharrow v. Brown, 447 F.2d 94, 97 (2d Cir. 1971) (noting that plaintiff's claim of standing to challenge the method of apportionment "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York but for every other State as well."); *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 570, 572 (holding "none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" when plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" depending on "the interplay of all the other population factors which affect apportionment").[4]

All of these arguments apply equally to claims asserted by Representative Brooks, and then some. To the extent the State of Alabama's injuries are speculative, so, too, are any alleged injuries suffered by Representative Brooks, who appears to be bringing his claims as a voter in his congressional district.[5] Any such injury, however, is just as speculative as Alabama's alleged injury. *See Ridge*, 715 F. Supp. at 1312-18 (concluding that congressional representatives suing in individual capacity could not establish injury-in-fact due to speculative nature of their claims); *see also Fed'n for Am. Immigration Reform*, 486 F. Supp. at 570.

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[4] There is another basis to question Alabama's standing. The state is bringing this action as a *state qua state*, not as *parens patriae*. *See* Compl. ¶ 1 (alleging that the state "has a cognizable interest *in its own right* in representation in the House of Representatives and the Electoral College"). The *Ridge* court found, however, that allegations of "[t]he loss of representation," whether in the House of Representatives or the Electoral College, "cannot be suffered by a state, but only by the residents of [a] state." *Ridge*, 715 F. Supp. at 1321.

[5] If Representative Brooks is pursuing claims in his capacity as a Representative, any injuries would be speculative because it is unclear (and unalleged in the Complaint) what effect, if any, the inclusion of illegal aliens would have on his particular congressional district. That, alone, justifies dismissal of any claims being brought by Representative Brooks in that capacity. And to the extent Representative Brooks contends that he has standing as a legislator, that clearly fails because legislative standing has been recognized in only two instances: "(1) when the [legislators] have been individually deprived of something they are personally entitled to, as in *Powell v. McCormack,* 395 U.S. 486 (1969)," or "(2) when the [legislators'] votes would have been sufficient to defeat (or enact) a bill which has gone into effect (or not been given effect) and 'their votes have been completely nullified,' as in *Coleman v. Miller*, 307 U.S. 433 (1939)." *Common Cause v. Biden*, 909 F. Supp. 2d 9, 24 (D.D.C. 2012) (some citations omitted) (citing *Raines v. Byrd*, 521 U.S. 811, 821-23 (1997)), *aff'd,* 748 F.3d 1280 (D.C. Cir. 2014). Neither of these circumstances are present here.

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II. Alabama's Alleged Financial Injury, Which Is Outside the Census Clause's Zone of Interests, Is Too Speculative to Confer Standing

Alabama also alleges that the inclusion of illegal aliens in the census will reduce the amount of federal and private funding that Alabama receives. *See* Compl. ¶¶ 73-86. Alabama's claim, of course, relies upon the same type of conjecture as its claim regarding a loss of representation: It is simply too speculative to predict what will be revealed by a census that has not yet taken place, and that will not occur until more than a year in the future. And to the extent funding decisions are based on total population, Alabama would nonetheless receive its fair share based on its total population, including its population of illegal alien residents (many of whom use government services, such as attending schools). For those reasons alone, Alabama's claim that it will lose federal funds if illegal aliens are included in the census is too speculative to support standing.

Alabama has failed to demonstrate injury for another reason: Although it is true that the enumerated population of the states will be larger with the inclusion of illegal aliens than it would be without their inclusion, Plaintiffs have not calculated whether the inclusion of illegal aliens in every state's population would result in a proportional or absolute loss of federal funds going to Alabama or its legal residents. Instead, Plaintiffs assert that some of this funding is based on population size and "[t]hese funds will be redistributed to states that show a higher population total in the Census that they would have shown if illegal aliens were excluded from the Census." Compl. ¶ 81. As for private funds, Plaintiffs fail to allege anything specific at all. Instead, they vaguely allude to "Department of Commerce estimates" about "private sector investment" by unidentified "[n]on-profit organizations." Compl. ¶¶ 83-84. Plaintiffs can only speculate that nonprofits providing natural disaster relief would leave Alabama for more highly concentrated communities of illegal alien residents. Compl. ¶ 84. Therefore, given the

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complexity of federal funding mechanisms and Plaintiffs' failure to allege any specific funding losses, Plaintiffs' allegations of lost funding are too speculative to establish Article III standing. *See Nat'l Law Ctr. on Homelessness & Poverty, v. Kantor*, 91 F.3d 178, 185 (D.C. Cir. 1996) (finding no standing where court could not determine "what effect any methodology for counting the homeless would have on the federal funding of any particular appellant.").[6]

Finally, even if Alabama has adequately pled a non-speculative funding injury, any such injury would not bring it within the zone of interests protected by the Constitution's Census Clause, which has no relation, and was not intended, to provide funding to state or local projects. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his [C]omplaint.") (citation omitted). Alabama's claimed funding-related injuries should therefore be dismissed for lack of prudential standing.

CONCLUSION

This Court should dismiss Plaintiffs' Complaint for lack of jurisdiction.

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[6] The Complaint does not appear to make any similar "loss of funding" claims by Representative Brooks, as it fails to allege that the Representative's district, in particular, will lose funding.

BC-DOC-0000001482

Dated: November 13, 2018

Respectfully submitted,

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BC-DOC-0000001483

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FILED
2018 Nov-13 PM 12:00
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 2:18-cv-00772-RDP
UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,	)	
Defendants.	)	

[PROPOSED] ORDER

This matter is before the Court on Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Because this Court lacks jurisdiction over Plaintiffs' lawsuit, Plaintiffs' Complaint shall be, and hereby is, DISMISSED.

DONE and **ORDERED** this _____ day of _____, 2018.

_____
R. DAVID PROCTOR
United States District Judge

FILED
2019 Feb-25 PM 01:36
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA and MORRIS J. BROOKS, JR., Representative for Alabama's 5th Congressional District, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, in his official capacity as Secretary of Commerce; BUREAU OF THE CENSUS; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau, *Defendants*, and DIANA MARTINEZ; RAISA SEQUEIRA; SAULO CORONA; IRVING MEDINA; JOEY CARDENAS; FLORINDA P. CHAVEZ; and CHICANOS POR LA CAUSA; COUNTY OF SANTA CLARA, CALIFORNIA; KING COUNTY, WASHINGTON; and CITY OF SAN JOSE, CALIFORNIA, *Intervenor-Defendants.*	Case No. 2:18-cv-00772-RDP

DEFENDANTS' REPLY SUBMISSION IN RESPONSE TO EXHIBIT B OF THE COURT'S ORDER
(REPLY IN SUPPORT OF MOTION TO DISMISS)

Plaintiffs the State of Alabama and Representative Mo Brooks have brought this lawsuit challenging the Census Bureau's practice of including illegal aliens in its forthcoming census count, alleging that the inclusion of those aliens both will cause Alabama to lose a congressional representative and Electoral College vote and will, relatively speaking, result in a loss of federal and other funding vis-à-vis other states that purportedly have a larger number of resident illegal aliens. This Court, however, lacks jurisdiction over Plaintiffs' claims for two reasons. First, Plaintiffs have failed to adequately allege an actual or imminent representational or Electoral College injury because their allegation that Alabama will lose a representative or Electoral College vote if illegal aliens are included in the census is entirely speculative. The Supreme Court cases upon which Plaintiffs rely concern different factual scenarios than those presented here, and two of those cases involved a *post-count* challenge to the Census Bureau's practices to boot. None shed light on whether Plaintiffs here have adequately alleged a future injury in a manner sufficient to survive a motion to dismiss for lack of jurisdiction. Second, Plaintiffs have not adequately alleged a financial injury arising through the inclusion of illegal aliens in the census count; if anything, that alleged injury is even more tenuous than Plaintiffs' claim of a loss of a representative and Electoral College vote. For these reasons, this Court should dismiss Plaintiffs' lawsuit for lack of jurisdiction.[1]

I. Plaintiffs' Congressional Representation and Electoral College Injuries Are Too Speculative to Confer Standing

Plaintiffs have failed to allege an actual or imminent injury. Plaintiffs say otherwise, claiming that because this case involves a "future injury," they merely need to allege that "there is

[1] This Court has requested supplemental briefing on Alabama's alleged financial injury and redressability. *See* Order, ECF No. 55. Defendants addressed Alabama's alleged financial injury in their opening memorandum and do so again here. Regarding redressability, Defendants take no position at this time.

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a 'substantial risk' that the harm will occur." Pls.' Opp'n at 9-10, ECF No. 65 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). In support of this position, Plaintiffs cite a series of census-related cases that arose under fundamentally different factual scenarios. None support Plaintiffs' claim of standing here.

For example, Plaintiffs rely upon *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), to argue that a party can challenge Census Bureau practices if those practices are likely to result in a loss of a representative. *See* Pls.' Opp'n at 8-9. That case, however, involved a challenge to specific, statistical sampling plans that had been identified by the Census Bureau to "supplement data obtained through traditional census methods." *See Dep't of Commerce*, 525 U.S. at 324; *see* Pls.' Opp'n at 9. That, alone, distinguishes *Department of Commerce* from the situation here, which does not involve "sampling." Moreover, included in the record that the Supreme Court reviewed in that case was an affidavit demonstrating that a state was "virtually certain to lose a seat." *Dep't of Commerce*, 525 U.S. at 331.[2] The fact that the Supreme Court has previously relied upon factual submissions regarding injury in a census case claiming a loss of a representative does not automatically confer standing on any plaintiff that

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[2] That Supreme Court decision involved the review of two district cases. In the first, a group of citizens and a county in Georgia based their claim of standing on alleged vote dilution and loss of federal funding. In granting a motion for summary judgment to plaintiffs and denying a motion to dismiss filed by defendants, the district court found that it had jurisdiction because plaintiffs were "able to calculate [the proposed sampling's] effects by reference to the results of [a previously-completed Census Bureau survey], which closely mirrors the methodology the Department will utilize." *Glavin v. Clinton*, 19 F. Supp. 2d 543, 548 (E.D. Va. 1998).

The other case was brought by the House of Representatives itself and, as such, did not involve claims of vote dilution or loss of funding as alleged by the Plaintiffs here. Instead, the alleged injuries were informational in nature. Thus, the district court concluded "that the House need not demonstrate that the use of statistical sampling will either alter state population totals or the resultant apportionment of representatives among the states." *U.S. House of Representatives v. Dep't of Commerce*, 11 F. Supp. 2d 76, 91 (D.D.C. 1998).

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alleges, in a conclusory and speculative fashion, that a similar injury is likely to exist here. That is especially so because Plaintiffs' claims in this lawsuit—challenging the inclusion of illegal aliens in a census that has not yet taken place—are fundamentally different than the challenge to specific, concrete sampling methodologies at issue in *Department of Commerce.* Instead, in order to survive a motion to dismiss, a plaintiff must offer more than "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts." *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). Yet that is all the State of Alabama and Representative Brooks have done: They rely on vague allegations of future "injury" based on the distribution of the illegal alien population, *see* Compl. ¶¶ 33-36, or estimates about that population that are now many years old, *see id.* ¶¶ 30, 39-40.

The other Supreme Court census cases discussed by Plaintiffs offer no help because they all took place after the census count was completed. Plaintiffs cite *Utah v. Evans*, 536 U.S. 457 (2002), but Utah brought its challenge to a Census Bureau sampling method known as "hot-deck imputation" that was used in the 2000 census only "[a]fter analyzing the census figures." *Id.* at 459. And the same is true in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), in which plaintiffs challenged the allocation of the Department of Defense's overseas employees to particular states. Thus, in both cases the impact of the Census Bureau's practice on apportionment could be ascertained with specificity, as it had already taken place. *See Utah*, 536 U.S. at 458 (imputation raised North Carolina's population by 0.4% while increasing Utah's population by 0.2%, thus resulting in North Carolina receiving one more representative and Utah receiving less representative); *Franklin*, 505 U.S. at 790-91 ("appellants' allocation of 922,819 overseas military personnel to the State designated in their personnel files as their "home of record" altered the relative state populations enough to shift a Representative from Massachusetts to Washington").

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Neither of these cases, in which the impact of the challenged practice could be ascertained with precision after-the-fact, therefore has any bearing on whether Plaintiff can allege a *future* injury here, before the Census Bureau has even conducted its count, much less whether Plaintiffs here have met the pleading standard for alleging such an injury.

Plaintiffs criticize Defendants' reliance on *Ridge v. Verity*, 715 F. Supp. 1308, 1310 (W.D. Pa. 1989), *Federation for American Immigration Reform v. Klutnick*, 486 F. Supp. 564, 571 (D.D.C. 1980), and *Sharrow v. Brown*, 447 F.2d 94, 97 (2d Cir. 1971), because these cases were decided at the summary judgment stage. What Plaintiffs ignore, however, are the holdings of the cases, all of which demonstrate the virtual impossibility of showing that the specific type of injury that Plaintiffs allege will occur here. *See Ridge*, 715 F. Supp. at 1318 (it would be "sheer speculation as to the identities of the states that will be affected by the inclusion of illegal aliens in the census count for purposes of apportionment"); *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 570 ("none of the plaintiffs are able to allege that the weight of his or her vote in the next decade will be affected" when plaintiffs "can do no more than speculate as to which states might gain and which might lose representation" depending on "the interplay of all the other population factors which affect apportionment"); *Sharrow*, 447 F.2d at 97 (standing claim "presents difficulty" because plaintiff "would have to show, at least approximately, the apportionment his interpretation . . . would yield, not only for New York but for every other State as well"). Plaintiffs' opposition brief fails to meaningfully address, much less come to grips with, the substantive analysis in each of these cases.[3]

[3] As noted in Defendants' opening memorandum, these arguments are equally applicable to Representative Brooks's claims. *See* Defs.' Mem. at 9, ECF No. 45-1.

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Finally, Plaintiffs cite the standards for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the well-pleaded-complaint rule to argue that this Court should deny Defendants' motion. *See* Pls.' Opp'n at 10-11. Defendants are moving to dismiss for lack of subject matter jurisdiction, however, which is analyzed under the requirements of Rule 12(b)(1). And as noted by Defendants in their opening brief, rigorous application of Rule 12(b)(1)'s requirements is necessary where, as here, a party is seeking to have the court invalidate the actions of a co-equal branch of government on constitutional grounds. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145-46 (2011); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-73 (1982). At minimum, that standard requires more than the vague allegations of injury offered here. *See Oxford Asset Mgmt.*, 297 F.3d at 1188. Because that is all that Plaintiffs offer, this case should be dismissed.

II. Alabama's Alleged Financial Injury, Which Is Outside the Census Clause's Zone of Interests, is Too Speculative to Confer Standing

Both Plaintiffs and the Local Government Intervenor-Defendants contend that the State of Alabama also has standing arising from an alleged future loss of funding. In some respects, this alleged injury is even more tenuous than Plaintiffs' alleged representation injury: Not only does Alabama need to allege that the inclusion of illegal aliens will result in a lower population total vis-à-vis other states, but it also must identify specific federal funding programs pursuant to which Alabama will receive payment based on those population figures.

Plaintiffs barely try to meet their burden. As noted by Defendants in their motion to dismiss, Plaintiffs' allegations regarding financial injury are vague and conclusory. *See, e.g.*, Compl. ¶ 81. Plaintiffs do not account for the different funding mechanisms used by various federal agencies; instead, they merely cite a handful of statutory and regulatory provisions and identify past grants to claim that the inclusion of illegal aliens in the census will harm Alabama in

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the future. These allegations fall far short of what is required to survive a motion to dismiss for lack of jurisdiction in this circuit. *See Oxford Asset Mgmt.*, 297 F.3d at 1188.[4]

Moreover, Plaintiffs fail to fully address Defendants' argument that any alleged financial injury falls outside the Census Clause's zone of interests. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) ("[A] plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his [C]omplaint.") (citation omitted). Plaintiffs cite *Susan B. Anthony List* to imply that the zone-of-interests requirement is no longer applicable, *see* Pls.' Opp'n at 15, but that case involved the prudential ripeness doctrine, not the zone-of-interests test. *Susan B. Anthony List*, 573 U.S. at 167. Moreover, in analyzing the prudential ripeness doctrine, the Court in *Susan B. Anthony List* referenced *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). And in *Lexmark*, the Court acknowledged that, while it has placed the zone-of-interests test "under the 'prudential' rubric in the past, it does not belong there" because "[w]hether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark*, 572 U.S. at 127 (citation omitted). *Susan B. Anthony List* therefore sheds no light whatsoever on the continued validity of the zone-of-interests requirement.

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[4] Many of the cases cited by Plaintiffs and the Local Government Intervenor-Defendants are not to the contrary. Some cases, for example, allege financial injury in the context of a post-census count challenge. *See, e.g.*, *Carey v.* Klutznick, 637 F.2d 834 (2d Cir. 1980); City *of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993); *City of Willacoochee v. Baldridge*, 556 F. Supp. 551 (S.D. Ga. 1983). In others, plaintiffs submitted affidavits to support assertions of standing. *See, e.g.*, *Dep't of Commerce*, 525 U.S. at 324 (discussing submission of affidavit in *Glavin*, 19 F. Supp. 2d 543)); *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 49, 50 (E.D.N.Y. 1989).

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To the contrary, the Supreme Court in *Lexmark* recently reaffirmed the validity of the zone-of-interests test, describing it as a "requirement of general application" that is "presumed" to apply to all causes of action unless "expressly negated." *Lexmark*, 572 U.S. at 129 (quotations omitted). In the APA context, the requirement asks whether "the plaintiff's interests are so marginally related to or inconsistent with the purposes" of the provision that they are not even "arguably" covered. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399-400 (1987). The requirement, however, applies more strictly where a plaintiff seeks to sue directly under the Constitution rather than the APA; in that context, the Supreme Court has essentially equated the test to the stringent requirement for implying "a private right of action under a statute." *Clarke*, 479 U.S. at 400 n.16. Plaintiffs bring claims under both the APA and the Constitution directly; the zone-of-interests requirement applies to all of those claims to the extent Plaintiffs rely upon alleged financial injury as a basis for bringing the claims.

Plaintiffs alternatively argue that they meet the zone-of-interests requirement because the Census Clause not only apportions representatives, but also "direct Taxes." Pls.' Opp'n at 15 (quoting Const. art. I, § 2, cl. 3). Nowhere in their Complaint, however, do Plaintiffs allege that the inclusion of illegal aliens will somehow affect any direct taxes imposed by the federal government, let alone in a manner that cognizably affects Alabama. In short, Plaintiffs' claim that they have standing due to financial injury fails.

CONCLUSION

This Court should dismiss this lawsuit for lack of jurisdiction.

BC-DOC-0000001494

Dated: February 25, 2019

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Counsel for Defendants

Sent: 7/29/2020 4:39:47 PM
Subject: FW: Materials for Director
Attachments: 1_20cv2023 Common Cause Et Al V. Trump Et Al Complaint.pdf; New York Case.pdf; NYIC Complaint.pdf; b(5) - WP

b(5) - WP

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAI'I, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON; CITY OF CENTRAL FALLS, CITY OF CHICAGO, CITY OF COLUMBUS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PHOENIX, CITY OF PITTSBURGH, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CITY OF SEATTLE; CAMERON COUNTY, EL PASO COUNTY, HIDALGO COUNTY, and MONTEREY COUNTY,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., *in his official capacity as Secretary of Commerce*; BUREAU OF THE CENSUS; and

20 Civ. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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STEVEN DILLINGHAM, *in his official capacity as Director of the United States Census Bureau*,

Defendants.

INTRODUCTION

1. This lawsuit challenges President Donald J. Trump's blatant disregard of an unambiguous constitutional command. The Fourteenth Amendment provides 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. The Framers of the Fourteenth Amendment deliberately chose the phrase "whole number of persons" to refer to *all persons living* in each State—including the "entire immigrant population not naturalized." Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Rep. John Bingham).

2. For 150 years—since the United States recognized the whole personhood of those formerly bound in slavery—the unambiguous requirement that all persons be counted for apportionment purposes, regardless of immigration status, has been respected by every executive official, every cabinet officer, and every President.

3. Until now. On July 21, 2020, President Trump issued a "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1). For the first time in our history, the Memorandum announces a "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." *Id.* at 44,680. It directs the Secretary of Commerce to provide the President with information to carry out this policy. And it declares the

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President's intent to make a determination of the "whole number of persons in each State" that will in fact exclude the undocumented immigrants he has targeted throughout his administration.

4. The President's new policy and any actions Defendants take to implement it unequivocally violate the Fourteenth Amendment. The constitutional mandate to base apportionment on "the whole number of persons in each State" could hardly be clearer, and the Supreme Court has long recognized that undocumented immigrants are "persons" under the Fourteenth Amendment, *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Memorandum's open disregard of the Constitution's plain text is reason enough to invalidate it and to prevent Defendants from taking steps to carry out its unlawful policy.

5. But Defendants' decision to exclude undocumented immigrants from apportionment also violates the Constitution and federal statutes in multiple additional ways. Defendants' decision unlawfully discriminates against Hispanics and immigrant communities of color in violation of the Due Process Clause of the Fifth Amendment. By explicitly targeting and punishing States that refuse to assist in this administration's enforcement of federal immigration law, Defendants' decision violates the Tenth Amendment. And Defendants' decision to exclude undocumented immigrants from apportionment—as well as any action they take to implement or further that decision—is both contrary to law and arbitrary and capricious, in violation of the Administrative Procedure Act.

6. Defendants' decision harms Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests. If Defendants succeed in excluding undocumented immigrants from apportionment, some Plaintiffs will suffer severe injury to their most basic rights under our Constitution's representational form of government: they will improperly lose one or more Members in the House of Representatives and one or more corresponding electors in the

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Electoral College. And removing undocumented immigrants from the apportionment base will further harm Plaintiffs by, for example, undermining their ability to conduct congressional and state-level redistricting, depriving them of critical federal funding, and eroding the quality of census data on which they rely to perform essential government functions.

7. Plaintiffs the State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawai'i, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, City of Central Falls, City of Chicago, City of Columbus, City of New York, City of Philadelphia, City of Phoenix, City of Pittsburgh, City of Providence, City and County of San Francisco, City of Seattle, Cameron County, El Paso County, Hidalgo County, and Monterey County therefore bring this action seeking declaratory and injunctive relief to hold Defendants to their obligation to base apportionment on "the whole number of persons in each State" and to forbid them from excluding undocumented immigrants—or any other person—from the apportionment base.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

9. Declaratory and injunctive relief is sought as authorized in 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs the State of New York and the City of New York are residents of this judicial district, and a

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substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

11. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized under N.Y. Executive Law § 63 to pursue this action.

12. Plaintiff the State of Colorado is a sovereign state of the United States of America. The State of Colorado brings this action by and through its Attorney General, Philip J. Weiser. The Attorney General has authority to represent the state, its departments, and its agencies, and "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party." Colo. Rev. Stat. § 24-31-101.

13. Plaintiff the State of Connecticut, represented by and through its Attorney General, William Tong, is a sovereign state of the United States of America. The Attorney General brings this action as the state's chief civil legal officer under Conn. Gen. Stat. § 3-124 *et seq*.

14. Plaintiff the State of Delaware is represented by and through its Attorney General Kathleen Jennings, and is a sovereign state of the United States of America. Attorney General Jennings is Delaware's chief law enforcement officer, *see* Del. Const., art. III, and is authorized to pursue this action under 29 Del. Code § 2504.

15. Plaintiff the District of Columbia is a municipal corporation empowered to sue and be sued, and is the local government for the territory constituting the permanent seat of the federal government. The District brings this case through the Attorney General for the District of Columbia, who is the chief legal officer for the District and possesses all powers afforded the

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Attorney General by the common and statutory law of the District. The Attorney General is responsible for upholding the public interest and has the authority to file civil actions in order to protect the public interest. D.C. Code § 1-301.81.

16. Plaintiff the State of Hawai'i, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Clare E. Connors is the chief legal officer of the State of Hawai'i and is authorized to appear, personally or by deputy, on behalf of the state in all courts and in all cases in which the state is a party. Haw. Const. art. V, § 6; Haw. Rev. Stat. Chapter 28; Haw. Rev. Stat. § 26-7.

17. Plaintiff the State of Illinois, represented by and through its Attorney General, Kwame Raoul, is a sovereign state of the United States of America. The Attorney General is Illinois's chief law enforcement officer and is authorized under 15 ILCS 205/4 to pursue this action.

18. Plaintiff the State of Maryland, by and through its Attorney General, Brian E. Frosh, is a sovereign state of the United States of America. The Attorney General is Maryland's chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General's powers and duties include acting on behalf of the State and the people of Maryland in the federal courts on matters of public concern. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, Joint Resolution 1.

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19. Plaintiff the Commonwealth of Massachusetts, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is authorized to pursue this action under Mass. Gen. Laws ch. 12, §§ 3 and 10.

20. Plaintiff the State of Michigan, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Michigan's chief law enforcement officer and is authorized under Michigan law, Mich. Comp. Laws §§ 14.28 and 14.29, to pursue this action.

21. Plaintiff the State of Minnesota, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Minnesota's chief legal officer and is authorized to pursue this action on behalf of the State. Minn. Stat. § 8.01.

22. Plaintiff the State of Nevada, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Aaron D. Ford is the chief legal officer of the State of Nevada and has the authority to commence actions in federal court to protect the interests of Nevada. Nev. Rev. Stat. § 228.170. Governor Stephen F. Sisolak is the chief executive officer of the State of Nevada. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. Nev. Const., art. 5, § 1.

23. Plaintiff the State of New Jersey, represented by and through its Attorney General Gurbir S. Grewal, is a sovereign state of the United States of America. The Attorney General is New Jersey's chief legal officer and is authorized to pursue this action on behalf of the State. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

24. Plaintiff the State of New Mexico, represented by and through its Attorney General Hector Balderas, is a sovereign state of the United States of America. The Attorney

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General is authorized to bring an action on behalf of New Mexico in any court when, in his judgment, the interests of the State so require, N.M. Stat. Ann. § 8-5-2.

25. Plaintiff the State of North Carolina, represented by and through Attorney General Joshua H. Stein, is a sovereign state of the United States of America. The Attorney General is the State of North Carolina's chief law enforcement officer and brings this challenge pursuant to his independent constitutional, statutory, and common-law authority.

26. Plaintiff the State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

27. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority under 71 Pa. Stat. § 732-204.

28. Plaintiff the State of Rhode Island, represented by and through its Attorney General, is a sovereign state of the United States. Attorney General Peter F. Neronha is the chief legal advisor to the State of Rhode Island and is authorized to pursue this action pursuant to his constitutional, statutory, and common law authority. R.I. Const. art. IX § 12, R.I. Gen. Laws §§ 42-9-1 *et seq.*

29. Plaintiff the State of Vermont, represented by and through its Attorney General, Thomas J. Donovan, is a sovereign state in the United States of America. The Attorney General

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is the state's chief law enforcement officer and is authorized to pursue this action pursuant to Vt. Stat. Ann. tit. 3, §§ 152 and 157.

30. Plaintiff the Commonwealth of Virginia brings this action by and through its Attorney General, Mark R. Herring. The Attorney General has the authority to represent the Commonwealth, its departments, and its agencies in "all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A).

31. Plaintiff the State of Washington, represented by and through its Attorney General, Robert W. Ferguson, is a sovereign state of the United States of America. The Attorney General is the chief legal adviser to the State of Washington and is authorized to pursue this action pursuant to RCW 43.10.030. The Attorney General's powers and duties include acting in federal court on matters of public concern.

32. Plaintiff the City of Central Falls is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

33. Plaintiff the City of Chicago is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Illinois.

34. Plaintiff the City of Columbus is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Ohio and the City's Home Rule Charter.

35. Plaintiff the City of New York is a municipal corporation organized pursuant to the laws of the State of New York. New York City is a political subdivision of the State and derives its powers through the New York State Constitution, New York State laws, and the New York City Charter. New York City is the largest city in the United States by population.

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36. Plaintiff the City of Philadelphia is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

37. Plaintiff the City of Phoenix is a municipal corporation organized pursuant to the laws of the State of Arizona.

38. Plaintiff the City of Pittsburgh is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

39. Plaintiff the City of Providence is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

40. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

41. Plaintiff the City of Seattle is a first-class charter city, incorporated under the laws of the State of Washington, empowered to sue and be sued, and represented by and through its elected City Attorney, Peter S. Holmes.

42. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas.

43. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas.

44. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas.

45. Plaintiff Monterey County, California is a political subdivision of the State of California.

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46. Plaintiffs are aggrieved by Defendants' decision and conduct and have standing to bring this action because Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury unless and until the challenged decision and conduct are enjoined.

47. Defendant Donald J. Trump is the President of the United States. He is responsible for the actions and decisions that are being challenged by Plaintiffs in this action and is sued in his official capacity.

48. Defendant the United States Department of Commerce is a cabinet agency within the executive branch of the United States government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Census. 13 U.S.C. § 4.

49. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is responsible for overseeing the Census Bureau, conducting the decennial census of the population, and reporting to the President the tabulation of total population by States for the apportionment of Representatives in Congress. 13 U.S.C. § 141. He is sued in his official capacity.

50. Defendant Bureau of the Census is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for planning and administering the decennial census.

51. Defendant Steven Dillingham is Director of the Census Bureau. He is sued in his official capacity.

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ALLEGATIONS

I. Constitutional and statutory background.

A. The Constitution requires apportioning Members of the House of Representatives among the States based on the total number of persons living in each State.

52. The Constitution requires that the Members of the House of 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; *see id.* art. I, § 2, cl. 3.

53. The number of Representatives apportioned to each State, along with the two Senators given to each State, determines the allocation among the States of electors in the Electoral College. *Id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3.

54. To apportion Representatives among the States properly (and ultimately to allocate electors among the States properly) the Constitution requires an "actual Enumeration" of the total population every ten years, *id.* art. I, § 2, cl. 3.

55. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and to use that enumeration of the total population "to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019).

56. More than two hundred years of history, practice, and judicial and administrative precedents establish that the apportionment of Representatives must be based on *all persons living* in each State, regardless of their citizenship or immigration status.

57. During the country's founding, the Framers debated the proper basis on which to apportion Representatives and declared that Representatives "shall be apportioned among the

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several States which may be included within this Union, according to their *respective Numbers*." U.S. Const. art. I, § 2, cl. 3 (emphasis added). The Framers repeatedly made clear that the basis for apportionment of Representatives was thus all persons. For example, as James Madison explained in 1788, the "fundamental principle of the proposed constitution" ensured that "the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants." The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001).

58. The original Apportionment Clause provided for only two exceptions to the use of total population for apportionment. First, "Indians not taxed" were excluded from the apportionment base. U.S. Const. art. I, § 2, cl. 1, § 3. Second, slaves were counted as only three-fifth of a person. *Id.* No other exceptions were provided, making clear that all other persons living in the United States needed to be counted by the decennial enumeration and included in the apportionment base.

59. When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats among the States and reaffirmed that apportionment must be based on *all persons living* in each State—citizens and noncitizens alike. The Framers of the Fourteenth Amendment rejected numerous proposals to change the basis of apportionment from total population to voter population. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposal to apportion representatives among the States "according to their respective legal voters").

60. Instead, the Framers amended the Constitution to remove the provision that counted slaves as three-fifths of a person and declared that apportionment of Representatives must be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

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As the Fourteenth Amendment's Framers explained, "numbers," *i.e.*, all persons living in each State, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (Jacob Howard).

61. Basing apportionment on all persons, the Framers further emphasized, ensured that each State's representation in the House reflected all persons regardless of whether they could then vote, including women, children, and the "entire immigrant population not naturalized." *Id.* at 432 (Rep. John Bingham); *see, e.g.*, *id.* at 411 (representation based on number of voters improperly "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)).

62. Since 1790, in accordance with the Constitution's express requirement to base apportionment on all persons living in each State, the decennial actual enumeration has *always* counted all persons living in the United States based on where they "usually reside[]." *See* Census Act of 1790, § 5, 1 Stat. 101 (1790); *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg, 28,950, 28,950 (May 20, 2015) ("The Census Act of 1790 established the concept of 'usual residence' as the main principle in determining where people are to be counted. This concept has been followed in all subsequent censuses.").

63. Under the Census Bureau's well-settled practice and a final rule that it promulgated pursuant to notice-and-comment rulemaking for the 2020 Census, usual residence means the place where a person lives and sleeps most of the time. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

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64. Accordingly, the decennial enumeration and apportionment base includes all noncitizens who live and sleep most of the time in the United States, regardless of their place of citizenship or immigration status. *See, e.g.*, *id.* The enumeration likewise counts noncitizens who are "members of the diplomatic community" "at the embassy, consulate, United Nations' facility, or other residences where diplomats live." *Id.*

65. By contrast, noncitizens who are temporarily visiting the United States, such as on a vacation or business trip, are not included in the decennial enumeration and apportionment base because they do not live and sleep most of the time in the United States. *See, e.g.*, *id.*

66. The millions of undocumented immigrants who do live in the United States have an established presence here. These immigrants have moved to the United States, and they are members of their state and local communities.

67. For example, the Migration Policy Institute has estimated, based on data from 2012 to 2016, that more than nine million undocumented immigrants have lived in the United States for five years or more. The Migration Policy Institute estimated that more than seven million undocumented immigrants have lived in this country for ten years or more, and that nearly four million undocumented immigrants have lived here for twenty years or more.[1]

68. Undocumented immigrants residing here both contribute to and participate in their communities and in many public programs. For example, millions of undocumented immigrants

[1] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

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work here and pay taxes.[2] Many undocumented immigrants live here with their family members, including children who are United States citizens.[3]

69. Based on the Constitution's text, more than two centuries of history, and well-settled census practice, the Supreme Court and other courts have repeatedly made clear that the Fourteenth Amendment requires apportionment of Representatives based on the total number of all persons living in each State. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 10-18 (1964); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). Courts have also repeatedly determined that the "whole number of persons" used to apportion Representatives includes all noncitizens who are living in the United States regardless of their immigration status. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-78 (D.D.C. 1980) (three-judge court).

70. The federal government, and several of the Defendants here, have conceded that the decennial enumeration that constitutes the apportionment base must count all persons living in the United States.

71. For example, on March 14, 2019, Secretary Ross testified under oath during a congressional committee hearing, stating "The constitutional mandate, sir, for the census is to try

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[2] *See, e.g.*, Jens Manuel Krogstad et al., Pew Research Center, *5 facts about illegal immigration in the U.S.* (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s (estimating that in 2017, the United States' civilian workforce included 7.6 million undocumented immigrants); American Immigration Council, *Adding Up the Billions in Tax Dollars Paid by Undocumented Immigrants* 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/adding_up_the_billions_in_tax_dollars_paid_by_undocumented_immigrants.pdf; Hunter Hallman, Bipartisan Policy Center, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer* (Mar. 28, 2018), https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/.

[3] Migration Policy Institute, *supra* (estimating that more than 3 million undocumented immigrants over the age of 15 resided with a citizen child under the age of 18).

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to count *every person residing* in the U.S. at their place of residence on the dates when the census is conducted." *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019) (emphasis added). Secretary Ross further testified that "the Department of Commerce is fully committed to administering as complete and accurate decennial census as we can. We intend to try to *count every person* taking all necessary actions to do so." *Id.* (emphasis added).

72. During a congressional committee hearing in February 2020, Census Bureau Director Dillingham stated that the Bureau will "*count everyone*, wherever they are living," including undocumented immigrants. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (Feb. 12, 2020) (emphasis added).

73. The federal government has repeatedly argued that excluding undocumented immigrants from the decennial enumeration or the apportionment base violates the Constitution and applicable statutes. For example, in *Federation for American Immigration Reform v. Klutznick*, the government urged a district court to reject claims demanding exclusion of undocumented immigrants from the "whole number of persons" that constitutes the apportionment base. The government explained that "the plain language of the Constitution, as well as the intent of its framers, establishes that *all* inhabitants, including illegal aliens, must be enumerated for the purpose of apportioning Representatives."[4]

74. Similarly, the Department of Justice's Office of Legislative Affairs has opined that the Constitution requires inclusion of undocumented immigrants in the decennial

[4] Defs.' Mem. of Points & Authorities in Support of Mot. to Dismiss or for Summary Judgment, No. 79-3269 (D.D.C.), *reprinted in 1980 Census: Counting Illegal Aliens, Hr'gs Before the S. Subcomm. on Energy, Nuclear Proliferation and Federal Services*, 96th Cong. 125-156 (1980).

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enumeration that constitutes the apportionment base. *See, e.g.*, Letter from Carol T. Crawford, Assistant Attorney General, to Senator Jeff Bingham (Sept. 22, 1989).

75. The population count derived from the census is used not only to apportion representatives and ultimately electors "but also to allocate federal funds to the States and to draw electoral districts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

76. For these reasons, the "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997).

B. The Census Act requires that the total population count used for congressional apportionment include all persons living in the United States.

77. The Constitution provides that an "actual Enumeration shall be made" every ten years "in such manner as [Congress] shall direct by law." U.S. Const. art. I, § 2. Congress has exercised its authority over the census by enacting various statutory provisions ("Census Act").

78. Congress has assigned the responsibility of conducting the decennial enumeration to the Secretary of Commerce, and the Secretary may delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141.

79. The Census Act requires that the decennial census be taken on April 1, 2020, the "decennial census date." 13 U.S.C. § 141(a). The Secretary of Commerce has no discretion to delay the decennial census date under the Census Act. *Id.*

80. Within nine months of the decennial census date, *i.e.*, by January 1, 2021, the Secretary of Commerce must report to the President "[t]he tabulation of total population by States" that is "required for the apportionment of Representatives in Congress among the several States." *Id.* § 141(b).

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81. Then, between January 3 and January 8, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a(a).

82. Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives must transmit "to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

II. Defendants' unlawful attempt to add a citizenship question to the decennial census.

83. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are directly related to Secretary Ross's earlier and unlawful attempt to alter the decennial census that provides the apportionment count by adding a question inquiring about citizenship status.

84. On March 26, 2018, Secretary Ross directed the Census Bureau to use the 2020 Census to demand information on the citizenship status of every resident in the country.[5] Secretary Ross stated that he had decided to add the citizenship question because doing so was "necessary to provide complete and accurate data" that would aid enforcement of the Voting Rights Act (VRA) by the Department of Justice.

[5] Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 7 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files" /2018-03-26_2.pdf.

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85. Many of the plaintiffs here filed a lawsuit challenging the addition of the citizenship question as, among other things, arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* Second Am. Compl., *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 210 (S.D.N.Y. filed July 23, 2018).

86. After an eight-day bench trial, the United States District Court for the Southern District of New York vacated Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire. *New York*, 351 F. Supp. 3d at 679. In so ruling, the court concluded that the plaintiffs had standing to sue because the inclusion of a citizenship question would deter participation in the census by households with a noncitizen and lead to a differential undercount of noncitizens and Hispanics that would concretely harm plaintiffs in various ways. *Id.* at 578-593. For example, the court found that adding a citizenship question would cause some plaintiffs to lose congressional seats, impair state and local redistricting efforts that rely on census numbers, harm the quality and accuracy of census data, and reduce federal funding to plaintiffs' jurisdictions. *Id.* at 593-98, 607-15.

87. The court also determined that Secretary Ross's decision violated the Administrative Procedure Act for several reasons, including because his rationale for adding the citizenship question was pretextual. *Id.* at 660-64. As the court explained, the evidence was "clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision [to add the citizenship question] was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Id.* at 660. The court noted that it was "unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were." *Id.* at 569-70.

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88. The Supreme Court granted certiorari before judgment and affirmed, in relevant part, the district court's final judgment setting aside the Secretary's decision to add a citizenship question. The Supreme Court held that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Dep't of Commerce*, 139 S. Ct. at 2573. The Court reasoned that the Secretary's decision "cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA" because there was "a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. In short, Secretary Ross's "VRA enforcement rationale—the sole stated reason—seems to have been contrived." *Id.*

89. After the Supreme Court remanded the case to the district court, the court entered a permanent injunction that enjoined the defendants "from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census." Order, *New York v. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 634 (S.D.N.Y. July 16, 2019).

90. On July 11, 2019, President Trump issued an Executive Order to "ensure that accurate citizenship data is compiled in connection with the census" notwithstanding the Supreme Court's decision and the district court's order precluding the use of a citizenship question in the 2020 Census. *Collecting Information About Citizenship Status in Connection with the Decennial Census*, Exec. Order 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019).

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91. To achieve that goal, President Trump directed all executive departments and agencies to provide to the Department of Commerce "the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country." *Id.*

92. In a public statement accompanying the issuance of the Executive Order, given from the White House's Rose Garden, President Trump made clear that the federal government would not be "backing down on our effort to determine the citizenship status of the United States population." President Donald Trump, *Remarks by President Trump on Citizenship and the Census* (July 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/. President Trump stated that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States.' Now they're trying to erase the very existence of a very important word and a very important thing: citizenship." *Id.*

93. President Trump further stated that, pursuant to the Executive Order, the federal government will be taking steps "to ensure that citizenship is counted so that we know how many citizens we have in the United States." *Id.*

III. The July 21, 2020 Memorandum directing exclusion of undocumented immigrants from the apportionment count.

94. Recent events have now laid bare the real reasons driving Secretary Ross's decision to add a citizenship question to the 2020 Census: to exclude undocumented persons from the "whole number of persons" that constitutes the apportionment base and to discriminate against Hispanics and noncitizens.

95. On July 21, 2020, President Trump issued a memorandum (i) declaring that undocumented immigrants will be excluded from the "whole number of persons in each State" enumerated by the 2020 Census and used to apportion the number of Representatives to each State, and (ii) directing the Secretary to take "all appropriate action" to provide the President

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with information to exclude undocumented immigrants from the apportionment base. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1).

96. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 Census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible." *Id.* at 44,680.

97. The Memorandum asserts that the Executive branch has purported "discretion" to exclude from the apportionment base all undocumented immigrants who reside in the United States, *id.* at 44,679—no matter how long they have been living here.

98. The Memorandum acknowledges that the Constitution explicitly requires apportionment of Representatives based on the "whole number of persons in each State." *Id.* It states that not every person who is physically present on the decennial census date is living in the United States. *Id.* For example, the Memorandum states, noncitizens who are temporarily visiting on vacation or for business are not "inhabitants" of the United States and are thus not included in the apportionment base. *Id.* Without any plausible basis, the Memorandum then asserts that purported "discretion delegated to the executive branch to determine who qualifies as an 'inhabitant' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status"—even if those persons have been living in the United States for many years. *Id.*

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99. In the Memorandum, President Trump targets States (including some of the plaintiff States) that have many undocumented immigrants living in their jurisdictions or that have declined to affirmatively assist the federal government's immigration enforcement efforts.

100. For example, President Trump stated that "[a]ffording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* at 44,680. The Memorandum further stated that States that decline to adopt state laws or policies to assist federal efforts to enforce the immigration laws passed by Congress should essentially be stripped of any "representation in the House of Representatives" that is based on undocumented immigrants living in their jurisdictions. *Id.*

101. The Memorandum requires Secretary Ross, in preparing his § 141(b) report of the actual enumeration on which apportionment must be based, to take actions "to provide information" to the President to exclude undocumented immigrants from apportionment. *Id.* The Memorandum thus directs the Secretary (and by extension the Commerce Department and Census Bureau) to take actions to enable the President to exclude undocumented immigrants from his § 2a(a) report of both the "whole number of persons in each State" and the corresponding number of Representatives that each State receives. *Id.*

102. On the same day that he issued the Memorandum, President Trump issued a public statement making clear that Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are a continuation of the federal government's prior unlawful attempt to add a citizenship question to the 2020 Census. President Donald Trump,

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Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

103. As President Trump's statement explained, he had previously asserted during his Rose Garden statements in July 2019 that he "would not back down in [his] effort to determine the citizenship status of the United States population." *Id.* He further explained that he was now following "through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." *Id.* Echoing his earlier statements about the citizenship question, Trump further asserted that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States'" and that "the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country." *Id.* He stated that his Memorandum directing exclusion of undocumented immigrants from the apportionment base responds to a purported "broader left-wing effort to erode the rights of Americans citizens." *Id.*

104. Upon information and belief, following receipt of the Memorandum, the Secretary or Department of Commerce has issued (or will imminently issue) directives to the Census Bureau, constituting final agency action, to implement President Trump's directive to exclude noncitizens from the enumeration and apportionment base.

IV. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color.

105. The Memorandum explicitly states that its goal is to reduce political influence and congressional representation to jurisdictions with a larger share of undocumented immigrants. 85 Fed. Reg. at 44,680.

106. President Trump has repeatedly articulated concerns about the growth of immigrant communities and the impact of that growth on political power, and has sought to

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minimize the power of Hispanic and immigrant communities to increase the power of non-Hispanic whites.

107. During the 2016 presidential campaign, for example, President Trump tweeted: "How crazy—7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[6]

108. On April 5, 2018, when discussing his opposition to family-based immigration systems, President Trump claimed that Democrats favor "chain migration" because the party believes the immigrants will "vote Democratic." Three weeks later, on April 28, President Trump revisited this topic, stating that Democrats favor undocumented immigration because "all of these people that are pouring across are going to vote for Democrats, they're not going to vote for Republicans."[7]

109. Defendants' exclusion of undocumented immigrants from the apportionment base is of a piece with President Trump's anti-immigrant and anti-Hispanic rhetoric and his Administration's targeting of immigrant and Hispanic communities, which reflect animus towards those groups.

110. President Trump has long engaged in rhetoric that disparages Hispanics and immigrants of color. In statements stretching back to the beginning of his campaign, President Trump has repeatedly dehumanized, devalued, and vilified immigrants in general, and specifically immigrants from Latin America. For instance:

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[6] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[7] Fox News (@FoxNews), Twitter (Apr. 28, 2018), https://twitter.com/foxnews/status/990383288232620032.

a. During his campaign launch in June 2015, President Trump claimed that "[w]hen Mexico sends its people. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from more than Mexico. It's coming from all over South and Latin America."[8]

b. During a meeting about recent immigrants in the Oval Office in June 2017, President Trump stated that 15,000 immigrants from Haiti "all have AIDS" and that 40,000 immigrants from Nigeria would never "go back to their huts" in Africa after seeing the United States.[9]

c. During a January 2018 meeting with lawmakers, while discussing protections for immigrants from Haiti, El Salvador and other African countries, President Trump asked why the United States is "having all these people from shithole countries come here" and suggested that the United States should have more immigrants from countries like Norway.[10]

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[8] *Full text: Donald Trump announces a presidential bid*, Wash. Post, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

[9] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[10] Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as 'shithole' countries*, Jan. 12, 2018, https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946.

d. In a May 16, 2018 speech, President Trump stated that "[w]e have people coming into the country, or trying to come in . . . . You wouldn't believe how bad these people are. These aren't people, these are animals."[11]

e. Speaking on the topic of migrant groups travelling to the United States from Central America at a rally on May 8, 2019, President Trump, stated, "[W]hen you see these caravans starting out with 20,000 people, that's an invasion."[12]

111. President Trump has acted on this rhetoric by adopting policies that seek to isolate, exclude, and instill fear in Hispanic immigrants and other immigrants of color. For instance, the Trump Administration has:

a. Attempted to rescind the Deferred Action for Childhood Arrivals program, which protected 800,000 individuals, 90% of whom were Hispanic and 80% of whom were Mexican-American;

b. Banned travel from several majority-Muslim countries;

c. Suspended refugee admissions to the United States;

d. Terminated special protections from removal for migrants from nations experiencing war and natural disasters, including Nicaragua, Honduras, Haiti and El Salvador;

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[11] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[12] *President Trump Holds Rally in Panama City Beach, Florida*, C-SPAN (May 8, 2019) (video), https://www.c-span.org/video/?460412-1/president-trump-holds-rally-panama-city-beach-florida.

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e. Increased actual and threatened raids and deportations of undocumented migrants, including, as recently as June 17, 2019, when President Trump tweeted a threat that "[n]ext week ICE will begin the process of removing the millions of illegal aliens who have illicitly found their way into the United States. They will be removed as fast as they come in";[13]

f. Attempted to build a physical wall along the Mexico-U.S. border;

g. Adopted policies of separating children from their families when entering the United States from Mexico, and detaining children separate from their parents and families thereafter; and

h. Maintained children and other migrants across the U.S.-Mexico border in detention facilities that the United Nations Children's Fund has described as "dire" and as causing "irreparable harm" to children housed in them.[14]

112. These public statements and actions from Defendant Trump establish that the rationale for excluding undocumented immigrants from the apportionment base is motivated by racial animus against immigrants of color, and a desire to curb the political power of immigrant communities of color.

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[13] Nick Miroff & Maria Sacchetti, *Trump vows mass immigration arrests, removals of 'millions of illegal aliens' starting next week*, Wash. Post, June 17, 2019, https://www.washingtonpost.com/immigration/trump-vows-mass-immigration-arrests-removals-of-millions-of-illegal-aliens-starting-next-week/2019/06/17/4e366f5e-916d-11e9-aadb-74e6b2b46f6a_story.html?utm_term=.ece5e6a6b7e6.

[14] *After Rio Grande tragedy, UNICEF chief highlights "dire" detention centres on US-Mexico border*, UN News (June 27, 2019), https://news.un.org/en/story/2019/06/1041421.

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V. Plaintiffs are harmed by Defendants' decision to exclude undocumented immigrants from the apportionment base.

113. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests because they will cause some Plaintiffs to lose congressional seats and decrease their share of presidential electors in the Electoral College; skew the division of electoral districts within Plaintiffs' jurisdictions by impairing state and local redistricting efforts that rely on the census count; reduce federal funds to Plaintiffs' jurisdictions by deterring immigrants from responding to the decennial census that is currently underway; and degrade the quality of census data that Plaintiffs rely on to perform critical governmental functions.

114. First, excluding undocumented immigrants from the apportionment count will likely cause several States to lose one or more Representatives in Congress, directly harming those Plaintiff States, as well as those Plaintiff counties and cities within affected States, by diluting their political power and undermining their interest in fair congressional representation.

115. For example, large numbers of undocumented immigrants reside in California, Texas, New York, New Jersey, and Illinois.[15] Defendants' decision to exclude undocumented immigrants from the apportionment count is likely to directly reduce representation for those jurisdictions in Congress, injuring the representational interests of Plaintiffs the State of New York, State of New Jersey, State of Illinois, City of Chicago, City of New York, City and County of San Francisco, Cameron County, El Paso County, Hidalgo County, and Monterey County.

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[15] Pew Research Center, November 27, 2018, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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Other Plaintiffs may also suffer direct representational harms if undocumented individuals are excluded from the apportionment count.

116. The Memorandum itself acknowledges and intends these harms. *See* 85 Fed. Reg. at 44,680 (recognizing that excluding undocumented immigrants will "result in the allocation" of fewer congressional seats "than would otherwise be allocated" to some states).

117. The loss of a congressional seat will also cause the affected Plaintiff States, counties, and cities to lose one or more votes in the Electoral College, impairing their ability to elect the President and Vice President and harming their political power.

118. Second, excluding undocumented immigrants from the apportionment base will harm Plaintiffs' representational interests by directly impairing Plaintiffs' ability to draw accurate districting lines for congressional, state, or local legislative districts.

119. To comply with the Fourteenth Amendment's one-person, one-vote requirement, States must use total population as the population base for congressional redistricting. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"); *see Evenwel*, 136 S. Ct. at 1129. Defendants' decision to exclude undocumented immigrants from the apportionment base will undermine Plaintiff States' ability to comply with this Constitutional mandate.

120. Certain Plaintiffs are required by state constitutional or statutory provisions to use the total population count from the decennial census as the basis for redistricting within their jurisdictions. New York state law provides, for example, that "each federal census taken decennially . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of

senate and assembly districts." N.Y. Const. art. III, § 4(a); *see also id.* §§ 3-5, 5-a. Many of the other Plaintiffs have comparable laws.[16]

121. Third, excluding undocumented immigrants from the apportionment base will deprive Plaintiffs of critical federal funding and inflict substantial financial harms on Plaintiffs.

122. Political science literature establishes that States that lose seats in Congress typically see a decrease in their share of federal outlays in subsequent years due to the reduction in their voting power in Congress. *See, e.g.*, Roy Elis, Neil Malhotra, & Marc Meredith, *Apportionment Cycles as Natural Experiments*, Political Analysis 358-76 (2009). Those Plaintiffs likely to lose representation in Congress therefore also stand to lose critical federal resources as a result.

123. All Plaintiffs will further suffer financial harm because Defendants' decision to exclude undocumented immigrants from the apportionment base will deter participation in the ongoing decennial census, undermining the Census Bureau's efforts to count immigrants and their families, and depriving Plaintiffs of their fair share of census-derived federal funds.

124. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants.[17] Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. These

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[16] *See, e.g.*, Chicago Municipal code § 2-8-300; D.C. Code § 1-1011.01; Mass. Const. Amend. art. CI, §§ 1, 2, arts. CIX, CXVII, CXIX; Nev. Const. art. IV, § 5, art. XV, § 13; Tex. Const. art. 3, § 26; Va. Code Ann. § 30-265; Vt. Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902; Wash. Const. art. II, § 43; Wash. Rev. Code §§ 29A.76.010, 44.05.090.

[17] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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households are already less likely to respond to the census questionnaire; this Administration's ongoing efforts to target immigrants—including Defendants' failed efforts to add a citizenship question to the decennial census—have engendered substantial fear within these communities.[18]

125. The COVID-19 pandemic has further hampered efforts to ensure that all people—including hard-to-count populations—are counted. For example, the census relies upon non-response follow up operations (NRFU) to contact potential respondents and increase the census response rate. But NRFU operations were suspended and delayed during the pandemic, and the Government Accountability Office has raised concerns that even when resumed, these efforts will be less effective in light of the virus.[19]

126. Defendants' decision to exclude undocumented immigrants from the apportionment base was announced just weeks before Census Bureau enumerators were finally scheduled to go into the field to encourage households to respond to the census,[20] creating confusion and further increasing the risk of an undercount.

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[18] *See, e.g.*, Alexandra Schmidt, *Citizenship question is gone. Michigan immigrants still distrust the Census*, (Mar. 2, 2020), https://www.bridgemi.com/michigan-government/citizenship-question-gone-michigan-immigrants-still-distrust-census (noting ongoing "fear among immigrants about what the government will do with information collected in the count").

[19] *See* U.S. Government Accountability Office, *2020 Census: COVID-19 Presents Delays and Risks to Census Count* https://www.gao.gov/products/GAO-20-551R#summary.

[20] U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19*, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited July 24, 2020).

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127. The announcement of Defendants' decision was intended to promote fear and deter participation in the census by immigrants and their families, including through the President's remarks that he "will not stand" for efforts to "conceal the number" of immigrants.[21]

128. The Census Bureau has repeatedly emphasized that "[e]veryone counts," citizens and noncitizens alike.[22] But Defendants' decision and actions to exclude undocumented immigrants from the apportionment base do the opposite. Excluding undocumented immigrants from the apportionment count communicates to immigrants that their census responses are less valuable and less important than those of citizens.

129. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. At least 320 federal domestic financial assistance programs rely on census data to allocate money; in fiscal year 2016, these programs "allocated about $900 billion using census-derived data." *New York*, 351 F. Supp. 3d at 596. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. The reduction in census participation caused by Defendants' announcement that they will exclude undocumented immigrants from the apportionment base will harm Plaintiffs by depriving them of their statutory fair share of federal funding and removing crucial resources for important government services.

130. Finally, by deterring immigrants and their families from responding to the decennial census, Defendants' decision to exclude undocumented immigrations from the apportionment base will degrade the quality of census data. As census self-response rates

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[21] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

[22] *See, e.g.*, Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html.

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decline, the quality of the data—including information relating to population subgroups and their characteristics—worsens. But Plaintiffs "rely on accurate data to perform essential governmental functions," including to draw school zones, deploy health care resources, and make infrastructure decisions. *Id.* at 600. Defendants' decision will therefore undermine Plaintiffs' interests in using accurate census data to perform critical governmental functions.

VI. Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants.

131. Defendants cannot reliably exclude undocumented immigrants from the apportionment count. Just months ago, the Federal Government represented in separate litigation that there is a "lack of accurate estimates of the resident undocumented population" on a state-by-state basis.[23]

132. Although a previous executive order suggests that the Census Bureau may rely on administrative records to identify *noncitizens*, *see* 84 Fed. Reg. at 33,821, many noncitizens are lawfully present; and administrative records cannot provide sufficiently reliable or accurate information about whether noncitizens are *undocumented*, particularly for actual enumeration and apportionment purposes. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[24] The limited administrative records available with respect to undocumented immigrants are incomplete, outdated, and often inaccurate.

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[23] Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. Mar. 13, 2020).

[24] John L. Czajka, *Can Administrative Records Be Used to Reduce Nonresponse Bias?*, 645 Annals Am. Acad. Pol. & Social Sci. 171, 175 (2013).

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133. For example, the Department of Homeland Security (DHS) recently acknowledged that determining immigration status from their records is "challenging," given the "the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system."[25] DHS has acknowledged that time lags between collecting and reporting data mean that "data accuracy issues may arise."[26] Even when used in combination, existing administrative records are inadequate to ascertain reliably whether individuals are undocumented.

134. Although the federal government has already suggested that they may resort to "statistical modeling" to estimate the undocumented population in furtherance of the Presidential Memorandum, the Census Bureau has not yet "formulated a methodology,"[27] and Defendants have not articulated how such statistical modeling will comport with their constitutional obligation to conduct an "actual Enumeration." U.S. Const. art. 1, § 2, cl. 3.

135. Despite Defendants' failure to identify any reliable method to accurately enumerate the population of undocumented immigrants, Defendants have already decided to report that population to the President and to exclude that population from the tabulation of total population reported to Congress. Defendants' commitment to proceeding on this course of action without regard to the unreliability or inaccuracy of their underlying enumeration demonstrates that they have prejudged the decision, violates their statutory obligations to report

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[25] Department of Homeland Security, *Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau*, 2, 11 (Dec. 20, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf.

[26] *Id.* at 6.

[27] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985.

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total population, and confirms the irrational and arbitrary nature of their decision and actions to exclude undocumented immigrants from the actual enumeration and apportionment base.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(U.S. Constitution article I, section 2, clause 3; U.S. Constitution amend. XIV, sec. 2)

136. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

137. The Constitution requires that "Representatives shall 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; *see id.* art. I, § 2, cl. 3.

138. Undocumented immigrants are persons. *Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

139. Defendants' decision to exclude undocumented immigrants from the apportionment base for the purpose of reapportionment of Representatives following the 2020 Census, as well as any action they take to implement or further that decision, violates the constitutional command to apportion Representatives "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

140. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF

(U.S. Constitution amend. V—Due Process Clause)

141. Plaintiff States incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

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142. Under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal government cannot deny to any person the equal protection of its laws. The Due Process Clause specifically prohibits the federal government from discriminating against individuals on the basis of race, ethnicity, and national origin. U.S. Const. amend. V.

143. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color. This animus is reflected in Defendants' repeated statements vilifying these communities.

144. The highly unusual chronology of events, sharp departure from centuries of past practice, articulation of a pretextual reason for Defendants' now-enjoined efforts to demand citizenship information on the decennial census questionnaire, and disproportionate burden of Defendants' decision on Hispanics and immigrant communities of color further indicate that Defendants' decision is motivated by unconstitutional discriminatory purpose.

145. By excluding undocumented immigrants from the apportionment base, Defendants intend to reduce political power, influence, and funding resources among Hispanic and immigrant communities as compared to non-Hispanic whites.

146. Defendants' violation causes ongoing harm to Plaintiff States and their residents.

THIRD CLAIM FOR RELIEF

(U.S. Constitution amend. X)

147. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

148. The Tenth Amendment prohibits the federal government from coercing states and localities to legislate or promote policies that capitulate to federal interests.

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149. Defendants' decision to exclude undocumented immigrants from the apportionment count punishes Plaintiffs for refusing to assist in the enforcement of federal immigration law, in an attempt to coerce Plaintiffs to change their policies. 85 Fed. Reg. at 44,680.

150. The Tenth Amendment requires the federal government to respect the equal sovereignty of the sovereign states.

151. Without adequate justification, Defendants' decision to exclude undocumented immigrants from the apportionment count impermissibly targets certain states for unfavorable treatment because of their refusal to assist in the enforcement of federal immigration law. 85 Fed. Reg. at 44,680.

152. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

FOURTH CLAIM FOR RELIEF

(Administrative Procedure Act, 5 U.S.C. § 706)

153. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

154. The Administrative Procedure Act provides that the Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

155. Defendants' decision to exclude undocumented immigrants from the apportionment base, as well as any action they take to implement or further that decision, is arbitrary and capricious because it is contrary to the evidence before the agency and fails to consider important aspects of the problem, including that Defendants lack data reliably to exclude undocumented immigrants from the apportionment base.

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156. Defendants' decision and any implementing actions they undertake are also not in accordance with law because the Census Act requires the Secretary to tabulate and report to the President a tabulation of "total population by States . . . as required for apportionment of Representatives in Congress." 13 U.S.C. § 141(b).

157. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census, as well as any action they take to implement or further that decision, is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census is intentionally discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment;

3. Declare that Defendants' decision and any implementing actions they take are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

4. Enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy;

5. Issue an order holding unlawful, vacating, and setting aside the decision to exclude undocumented immigrants from the apportionment base, as well as any action taken to implement or further that decision;

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6. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report to the President the total population by States under 13 U.S.C § 141(b) based solely on the total number of persons in each State, including undocumented immigrants, without providing any information about the number of undocumented immigrants in each State.

7. Issue a writ of mandamus compelling the President to transmit to Congress pursuant to 2 U.S.C. § 2a(a) a statement of the whole number of persons in each State, and 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, based on the total number of residents of each state, including undocumented immigrants.

8. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and

9. Grant such other and further relief as the Court deems just and proper.

DATED: July 24, 2020

Respectfully submitted,

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* Application for *pro hac vice* admission forthcoming

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Exhibit 1

Federal Register
Vol. 85, No. 142
Thursday, July 23, 2020

Presidential Documents

Title 3—

The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the ''whole number of persons in each State,'' which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is ''the President's personal transmittal of the report to Congress'' that ''settles the apportionment'' of Representatives among the States, and the President's discretion to settle the apportionment is more than ''ceremonial or ministerial'' and is essential ''to the integrity of the process'' (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the ''persons in each State, excluding Indians not taxed,'' to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term ''persons in each State'' has been interpreted to mean that only the ''inhabitants'' of each State should be included. Determining which persons should be considered ''inhabitants'' for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are ''persons'' who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically ''in'' a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an ''inhabitant'' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

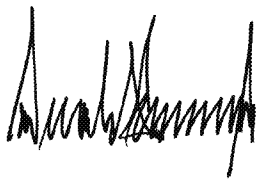
Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
Washington, July 21, 2020

[FR Doc. 2020–16216
Filed 7–22–20; 2:00 pm]
Billing code 3510–07–P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC. Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau, Defendants.	Civil Action No.

COMPLAINT

1. This action challenges President Trump's lawless attempt to exclude undocumented immigrants from the "persons" who must be counted in the Census for purposes of apportioning congressional seats to states. This xenophobic effort to deny the basic humanity of undocumented immigrants violates Article I's mandate to count all "persons" in the Census, and the Fourteenth Amendment's requirement that

"Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State . . . ." (emphasis added). These words leave no room for doubt: they expressly mandate counting "the whole number of persons" living in the United States for purposes of congressional apportionment. As the Supreme Court held just four years ago, "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including all non-citizens living in the United States, regardless of legal status. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016).

2. Despite this exceedingly clear constitutional command and binding Supreme Court precedent, on July 21, 2020, Defendant Trump issued a Presidential Memorandum addressed to Defendant Commerce Secretary Wilbur Ross titled, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). The Memorandum purports to declare—for the first time in our nation's history—that it is "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.)." In other words, the Memorandum directs Secretary Ross: do not count undocumented immigrants at all for purposes of congressional apportionment.[1]

[1] The Memorandum appears to potentially exclude both those with no form of status whatsoever as well as those currently authorized to remain and work in the U.S., such as holders of Deferred Action for Childhood Arrivals, who are nonetheless not "in lawful status under the Immigration and Nationality Act." See *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 487 (9th Cir. 2018) ("recipients of deferred action enjoy no formal immigration status") (quotations omitted), *rev'd in part, vacated in part sub nom Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412

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3. Rarely does any government actor, much less the President of the United States, so openly and obviously violate the Constitution. The Fourteenth Amendment mandates "counting the whole number of persons" for congressional apportionment. As the Supreme Court reaffirmed nearly four decades ago, an undocumented individual living in the United States "is surely 'a person' in any ordinary sense of that term," "[w]hatever his status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The President cannot change the fact that undocumented individuals are human beings.

4. The new "policy" also breaks an uninterrupted line of history: every Decennial Census in our nation's history has included every person who lives in the United States, regardless of citizenship or immigration status, for purposes of apportioning congressional representation. Defendant Trump's new policy set forth in the Memorandum therefore not only violates the plain and unequivocal text of Section 2 of the Fourteenth Amendment and related Supreme Court precedent, it also departs from hundreds of years of consistent Census practice.

5. In addition to contravening the plain text of the Constitution, Supreme Court precedent, and an unbroken line of historical practice, the policy conflicts with the Department of Justice's own longstanding position—asserted repeatedly over decades in litigation in courts around this country, including to this Court in 2018—that undocumented immigrants are "persons" who must be counted in the Decennial Census

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(E.D.N.Y. 2018) ("Deferred action does not . . . confer lawful immigration status"), *vacated and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). For the sake of consistency, Plaintiffs refer to all those excluded here as "undocumented."

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and apportionment calculations. The Administration's own lawyers have made clear that the policy is unconstitutional.

6. The new policy is a discriminatory attack on immigrants and immigrant communities, and particularly immigrant communities of color. It is intended to erase these individuals and communities, and to send the message that they do not count. Indeed, whereas the original Apportionment Clause in Article I, Section 2 infamously discounted enslaved Black Americans as three-fifths of a person for purposes of congressional apportionment, the Memorandum raises this numerical dehumanization to a new level: not three-fifths, but zero.

7. In practical terms, the policy will result in states such as California, Texas, and New York receiving fewer congressional districts and Electoral College votes, diluting the political power of the residents of these states. The policy will also deplete federal resources from states and localities with substantial immigrant populations. The policy is rank discrimination on the basis of national origin, race, and ethnicity in violation of the Equal Protection and Due Process guarantees of the Fifth Amendment.

8. The effects of the new policy will cascade beyond the exclusion of undocumented immigrants from the Census count. It is no coincidence that the Memorandum was unveiled shortly before the Census Bureau was scheduled to commence non-response follow up ("NRFU") field operations to identify persons who have not yet responded to the Census. The new policy of excluding undocumented immigrants from the Census conveys a xenophobic message aimed at suppressing Census participation from households containing immigrants and noncitizens. Unless enjoined, the policy undoubtedly will undermine the effectiveness of the Census Bureau's

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operations and deter members of immigrant communities—including undocumented immigrants, noncitizen immigrants with legal status, and United States citizens—from participating in the Census.

9. The new policy also violates a panoply of other constitutional and statutory prohibitions, including constitutional separation of powers, the Census Act, and the Administrative Procedure Act.

10. This is not Defendant Trump's first attempt to weaponize the Census to attack immigrant communities. Last year, the Supreme Court affirmed that the administration's effort to add a citizenship question to the 2020 Decennial Census would reduce Census responses among non-citizen households, and held that Defendant Ross's publicly-stated rationale—purportedly to help enforce the Voting Rights Act—was "contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66, 2575 (2019).

11. In issuing the Memorandum, Defendant Trump has now confessed the real reason behind that failed effort: to delete undocumented immigrants from the decennial enumeration altogether, and to exclude them categorically from the very concept of *personhood* in the Constitution. Among its many cynical motivations, the President's new policy is an obvious attempt to evade the consequences of the Supreme Court's decision and the permanent injunction issued by the district court in the citizenship question litigation. *See Dep't of Commerce*, 139 S. Ct. 2551; Order, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 634 (S.D.N.Y. July 16, 2019).

12. Plaintiffs therefore request declaratory, injunctive, and/or mandamus relief to prohibit Defendants from excluding undocumented immigrants from the population count used to apportion the House of Representatives.

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JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346(a), and 28 U.S.C. § 1361.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(e).

15. This Court has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

PARTIES

A. Plaintiffs

1. The New York Immigration Coalition

16. The New York Immigration Coalition ("NYIC") is an umbrella policy and advocacy organization for more than 200 groups in New York State, representing the collective interests of New York's diverse immigrant communities and organizations. It has its principal place of business at 131 West 33rd St, New York, NY 10001.

17. NYIC's mission is to unite immigrants, members, and allies so that all New Yorkers can thrive. It envisions a New York State that is stronger because all people are welcome, treated fairly, and given the chance to pursue their dreams. NYIC pursues solutions to advance the interests of New York's diverse immigrant communities and advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups. It seeks to build the power of immigrants and the organizations that serve them to ensure their sustainability, improve people's lives, and strengthen New York State.

18. NYIC's 200-plus members are dues-paying, 501(c)(3), nonprofit organizations that are committed to advancing work on immigrant justice, empowerment,

and integration. NYIC's members are located throughout New York State and beyond. These member groups include grassroots community groups, social services providers, large-scale labor and academic institutions, and organizations working in economic, social, and racial justice. A number of NYIC's member organizations receive funding from a variety of local, state, and federal government sources to carry out social service, health, and education programs. Many of these organizations receive governmental funding that is directly tied to the Decennial Census.

19. New York is likely to lose at least one House seat during the post-2020 Decennial Census apportionment process as a result of the exclusion of undocumented immigrants from the apportionment base. NYIC member organizations will lose political power because of New York's loss of at least one seat in the House of Representatives.

20. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure a number of NYIC's member organizations that receive funding to carry out social service, health, and education programs in these areas.

21. As an organization, NYIC has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, NYIC has and will continue to invest resources in Get Out the Count efforts through robust advocacy, outreach, and mass educational forums.

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22. The Census is ongoing, with the Census Bureau's NRFU just getting started.[2] NYIC plans to continue its Get Out the Count efforts during this NRFU. In its extensive Decennial Census outreach, NYIC will now face a much more difficult environment due to the perception among New York undocumented immigrants that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

23. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, NYIC will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to NYIC's Get Out the Count efforts will be diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, NYIC has already, and will continue to, divert resources from its other organizational priorities, including its work on health care

[2] U.S. Census Bureau, *2020 Census: Nonresponse Followup*, https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html (June 19, 2020).

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and language access issues, to address these concerns about decreased Census participation.

2. Make the Road New York

24. Plaintiff Make the Road New York ("Make the Road New York") is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains.

25. Make the Road New York's mission is to build the power of immigrant and working-class communities to achieve dignity and justice. To achieve this mission, they engage in four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation.

26. Make the Road New York has more than 22,000 members who reside in New York City, Long Island and Westchester County. These members lead multiple organizing committees across numerous issues and program areas of concern to the organization. Members take on leadership roles in the campaigns, determine priorities, and elect the representatives who comprise most of the Board of Directors.

27. The apportionment resulting from the exclusion of undocumented immigrants from the apportionment base will likely deprive New York of at least one seat in the House of Representatives, diminishing the political and voting power and influence, and thus injuring, Make the Road members who live in New York.

28. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

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29. Make the Road New York members include individuals who do not have lawful immigration status and as a result of the Memorandum will not be counted for apportionment of Congressional seats. Make the Road New York members also reside in states and localities where immigrant communities of color constitute significant portions of the population, including New York City and suburban areas outside of New York City. Its members in these jurisdictions rely on a number of government services whose funding is allocated based on population and demographics determined by the Decennial Census. This includes parents with children enrolled in Title I schools, and drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

30. Make the Road New York members will be deprived of funding to which they would be entitled by a more complete Census count.

31. One of the many Make the Road members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Perla Liberato. Ms. Liberato is a resident of Queens County, NY, where she works as a Youth Organizer. Because Ms. Liberato resides in New York State, she will lose political power because of her state's loss of representation in Congress.

32. Another Make the Road member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Yatziri Tovar. Ms. Tovar is a resident of Bronx County, NY, and works as a media specialist. Because Ms. Tovar resides in New York State, she will lose political power because of her state's loss of representation in Congress.

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33. Make the Road New York has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. For the 2020 Decennial Census, Make the Road New York is engaged in outreach and education work and receiving outside funding to help support this work. This work includes, among other things, general education programs, workshops for members, and person-to-person outreach. Make the Road New York's Census outreach efforts have already contacted over 100,000 people and assisted over 7,500 people with completing the Census questionnaire.

34. Make the Road New York will now face a much more difficult environment due to its constituents' heightened fear of interacting with government workers, which will be increased by anti-immigrant actions such as the decision to exclude undocumented immigrants from the apportionment base. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

35. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, Make the Road New York will be forced to expend more resources on their Decennial Census outreach efforts to reduce the effect of this policy change on the response rate in the immigrant communities of color it serves.

36. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision

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to exclude undocumented immigrants from the apportionment base, Make the Road New York will need to divert resources from other areas critical to its mission including civic engagement and providing legal services.

3. CASA

37. Plaintiff CASA is a nonprofit membership organization headquartered in Langley Park, Maryland. It has offices in Maryland, Virginia and Pennsylvania. CASA is the largest membership-based immigrants' rights organization in the mid-Atlantic region, with more than 90,000 members.

38. CASA's mission is to create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment, and legal services to immigrant communities. CASA serves nearly 20,000 people a year through its offices and provides support to additional clients over the phone and through email.

39. CASA as an organization receives governmental funding that is directly tied to the Decennial Census. Among other things, CASA receives Community Development Block Grant (CDBG) funds that are allocated based on population and demographics determined by the Decennial Census, including poverty levels. The exclusion of undocumented immigrants in the Census base count will very likely result in a lower percentage of CDBG funds allocated to the areas that CASA serves, and therefore CASA will receive fewer such funds.

40. CASA has an ongoing commitment to promote participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, CASA is participating in ongoing outreach and education work.

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41. CASA plans to continue its Get Out the Count efforts during the NRFU. But CASA's efforts will be undermined by the decision to exclude undocumented immigrants from the congressional apportionment because this will decrease participation among undocumented immigrants who will believe that they no longer need to complete the Census, and it will heighten fear of interacting with government workers among immigrant communities of color. This fear extends not only to undocumented immigrants but also to family members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

42. Because of the difficulties created by the decision to exclude undocumented immigrants from the Census count base, CASA will be forced to expend more resources on its Decennial Census outreach efforts to reduce the effect of this change in policy on the response rates in the immigrant communities of color it serves.

43. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the Census count base, CASA will need to divert resources from other areas critical to its mission, including job training and health outreach.

4. The American-Arab Anti-Discrimination Committee

44. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending and promoting the rights and liberties of Arab-Americans and other persons of Arab heritage. ADC is the largest American-Arab grassroots civil rights organization in the United States.

45. Founded in 1980 by former Senator James Abourezk, ADC's objectives include combating stereotypes and discrimination against and affecting the Arab-

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American community in the United States, serving as a public voice for the Arab-American community in the United States on domestic and foreign policy issues, and educating the American public in order to promote greater understanding of Arab history and culture. ADC advocates, educates, and organizes to defend and promote human rights and civil liberties of Arab-Americans and other persons of Arab heritage.

46. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California, New York, and Texas. Its members are also active through ADC's 28 local chapters and organizing committees, located in 20 states and the District of Columbia, including in Tucson and Phoenix, Arizona; Los Angeles and Orange County, California; Miami and Orlando, Florida; New York, New York; and Austin and Dallas, Texas.

47. ADC has members in states with significant populations of undocumented immigrants, such as Texas, New York, Florida, California, Arizona and Illinois. These states—particularly Arizona, California, New York, and Texas—are likely to lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. Many but not all of ADC's members in these states are U.S. citizens. The loss of political representation and political power will injure ADC's members in these states.

48. The exclusion of undocumented immigrants in the Census base count will reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian Americans, Arab Americans, and other immigrant communities of color constitute significant portions of the population. This will injure ADC members who

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reside in these areas, such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, Kings County, New York, and Prince George's County, Maryland. For example, ADC has members in these jurisdictions with children enrolled in Title I schools and members who use the roads on a regular basis and thus depend in part on federal highway funds for their upkeep.

49. As an organization, ADC is committed to promoting participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, ADC has undertaken engagement work within the Arab-American community. For example, ADC is conducting training for Census enumerators, running advertisements encouraging participation, and holding a strategy symposium, among other activities. ADC plans to continue its Get Out the Count work through the Non-Response Follow-Up time period.

50. ADC faces a difficult environment due to increased fear of interacting with government workers among the Arab-American community, a fear that will be heightened now because of the decision to exclude undocumented immigrants from the apportionment. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who fear that participating in the Decennial Census might endanger their loved ones.

51. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, ADC will be forced to invest more resources in its Decennial Census outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

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52. Because of the need to increase the time and money spent on Decennial Census outreach caused by the decision to exclude undocumented immigrants from the apportionment base, ADC will need to divert resources from other areas critical to its mission, including organizing, issue advocacy efforts, and educational initiatives.

5. The ADC Research Institute

53. Plaintiff ADC Research Institute ("ADCRI") is a 501(c)(3) corporation founded in 1982 by former Senator James Abourezk. ADCRI sponsors public programs and initiatives in support of the constitutional and First Amendment rights of Arab-Americans, as well as research studies, publications, seminars, and conferences that document discrimination faced by Arab-Americans in the workplace, schools, media and government agencies. These programs also promote a better understanding of Arab cultural heritage by the public and policy makers.

54. ADCRI is currently engaged in promoting Decennial Census participation among its constituents. ADCRI plans to continue this work through NRFU time period.

55. ADCRI is now facing a much more difficult environment due to increased fear in the Arab-American community of interacting with government workers, due in part to anti-immigrant actions such as the exclusion of undocumented immigrants from the apportionment base. Because of this heightened fear and suspicion, ADCRI will be forced to invest more resources in its outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

56. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the apportionment base, ADCRI will need to divert resources from other areas critical to its

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mission, including its engagement with public school teachers and other educational issues

6. FIEL Houton Inc.

57. FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. FIEL is an immigrant-led organization who advocates for just laws for immigrant youth, their families, access to higher education for all people regardless of immigration status and access to justice for the community.

58. FIEL provides resources for undocumented students, understanding the path to college is unsteady for many first and even second-generation Americans. FIEL's office is open to anyone seeking guidance in their process of obtaining a higher education, including assistance with applying to college and applying for scholarships and other financial aid. FIEL also provides a variety of immigration services for our community—from providing legal counsel for immigrants to begin their pathway to citizenship to handling most immigration cases.

59. FIEL was born out of the need for civic engagement in support of undocumented students seeking a higher education and conducts organizing for the betterment of the communities they serve, including outreach and campaigns related to the 2020 Decennial Census directed at immigrant communities in Texas.

60. Today, FIEL has approximately 11,000 members in the greater Houston area who help lead FIEL's organizing. FIEL members reside in parts of Texas where immigrant communities of color constitute significant portions of the population, including Harris County.

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61. Texas would lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. The loss of political representation and political power will therefore injure FIEL's many members who live in Texas

62. FIEL members in Houston rely on a number of government services whose funding is allocated based on population and demographics determined by the decennial Census. This includes parents with children enrolled in Title I schools, drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs, and many other programs and facilities that receive Census-guided funding. FIEL members will be deprived of the benefits of census-guided funding to which they would be entitled by a more complete census count.

63. One of the many FIEL members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Deyanira Palacios. Ms. Palacios is a lawful permanent resident and a resident of Montgomery County, Texas. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives.

64. Another FIEL member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Karen Ramos. Ms. Ramos is a resident of Harris County, Texas, where she works as a realtor. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives. Ms. Ramos is entitled to remain and work lawfully in the United States through the Deferred Action for Childhood Arrivals ("DACA")

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Program. She is entitled to be counted in the ongoing 2020 Decennial Census along with all other residents of Texas, regardless of their immigration status.

65. The exclusion of undocumented immigrants from the census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, including Texas. This will injure FIEL and its members who benefit from census-guiding funding to carry out social service, health, and education programs in these areas.

66. As an organization, FIEL has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, FIEL has and will continue to invest resources in Get Out the Count efforts.

67. The Census is ongoing, with the Census Bureau's Non-Response Follow-Up just getting started. FIEL plans to continue its Get Out the Count efforts during this Non-Response Follow-Up. In its extensive Decennial Census outreach, FIEL will now face a more difficult environment due to the perception among undocumented immigrants in Texas that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

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68. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, FIEL will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to FIEL's Get Out the Count efforts will diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, FIEL has already, and will continue to, divert resources from its other organizational priorities, including its work on access to education for students, to address these concerns about decreased census participation within immigrant communities.

69. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision to exclude undocumented immigrants from the apportionment base, FIEL will need to divert resources from other areas critical to its mission such as other civic engagement activities.

B. Defendants

70. Defendant Donald J. Trump is the President of the United States. In that capacity, Defendant Trump issued a July 21, 2020 Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, described *infra*. As President, he has the statutory responsibility of transmitting to Congress "a statement showing *the whole number of persons* in each State, excluding Indians not taxed, as

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ascertained under the seventeenth and each subsequent decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a (emphasis added). He is sued in his official capacity.

71. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Decennial Census. 13 U.S.C. § 4.

72. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He oversees the Bureau of the Census ("Census Bureau") and is thus responsible for conducting the Decennial Census of the population. 13 U.S.C. § 141(a). He has statutory responsibility to "take a decennial census of the population," 13 U.S.C. § 141(a), and for reporting to the President by January 1, 2021, a "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). He is sued in his official capacity.

73. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency responsible for planning and administering the Decennial Census.

74. Defendant Steven Dillingham is the Director of the Census Bureau and thus has responsibility for administering a complete count of all persons residing in the United States, including for the purpose of providing that figure to the Secretary of Commerce for transmission to the President. He is sued in his official capacity.

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FACTS

A. Background on the Decennial Census

1. The Constitutional Command to Include All People in the Census for Purposes of Congressional Apportionment

75. The Constitution requires a Decennial Census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers" (the Apportionment Clause). U.S. Const. art. I, § 2, cl. 3. It also directs that "[t]he 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" (the Census Clause). *Id.*

76. Key here, Section 2 of the Fourteenth Amendment provides 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." *Id.* amend. XIV, § 2 (emphasis added).

77. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count *every single person* residing in the United States, whether citizen or noncitizen, *whether living here with legal status or without*," and "[t]he population count derived from that effort is used . . . to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019) (emphases added).

78. Consistent with this express constitutional mandate, the federal government has conducted a Census that includes all persons living in the United States, regardless of citizenship or legal status, every ten years since 1790.

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79. This was historically subject to only two qualifications, both contained in the explicit text of the Constitution: "Indians not taxed," and the Three-Fifths Clause for persons who were enslaved. The first exception has not been relevant for some time; the second, the Three-Fifths Clause, assumed that enslaved persons would be included in the Census, but provided that they would not be counted as full persons for the purposes of calculating population for congressional apportionment.

80. The explicit nature of these two qualifications, neither of which applies in modern times, reinforces that the Decennial Census and the resulting apportionment base must include every person physically living in the United States.

81. The Civil War and the abolition of slavery repudiated the Three-Fifths Clause, which the Fourteenth Amendment then repealed. During debates over the Reconstruction Amendments, Congress considered, and affirmatively rejected, proposals that would have altered Congressional apportionment to be based on the population of voters, rather than total population. Thaddeus Stevens introduced a constitutional amendment that would have apportioned House seats "according to their respective legal voters." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 10 (1866)). Congress rejected that proposal. *Id.*

82. As ratified, Section 2 of the Fourteenth Amendment carried forward the basic total population mandate of the Apportionment Clause, providing, as stated, 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."

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83. In introducing this final language on the Senate Floor, Senator Jacob Howard explained the provision as follows:

> [The] basis of representation is numbers . . . that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime . . . . The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.

Evenwel, 136 S. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766-2767 (1866)).

84. In *Evenwel v. Abbott*, the Supreme Court held that Section 2 of the Fourteenth Amendment "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128. The proposition that non-citizens must be included in the population base for apportioning the total number of U.S. House seats to each state was central to the Court's holding that the Fourteenth Amendment does not prohibit states from including non-citizens in drawing legislative districts within a state. The Court explained: "It 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. The concurring Justices agreed that "House seats are apportioned based on total population." *Id.* at 1148 (Alito, J., concurring in the judgment); *see also id.* at 1138 (Thomas, J., concurring in the judgment) ("[F]eatures of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants."). *See also Wesberry v. Sanders*, 376 U.S. 1,

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14 (1964) (noting that the "principle solemnly embodied in the Great Compromise" is "equal representation in the House for equal numbers of people").

85. Lower courts have similarly recognized that the Constitution requires that all people be included in the population totals used for Congressional apportionment, regardless of citizenship status. As a three-judge panel of the District Court for the District of Columbia explained:

> The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all- inclusive. . . We see little on which to base a conclusion that illegal aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980); *see also, e.g.*, *New York*, 351 F. Supp. 3d at 514.

2. *The Government's Repeated Acknowledgment of Its Constitutional Obligation to Include All People in the Census for Purposes of Congressional Apportionment*

86. The Justice Department has likewise not only conceded but forcefully argued that it has a constitutional obligation to count every person residing in the United States no matter their immigration status, and to use that data for apportionment purposes.

87. Facing a legal challenge in the early 1980s to the inclusion of undocumented immigrants in apportionment figures in *Federation for American Immigration Reform v. Klutznick*, the Government argued that the plaintiffs there sought "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."

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Defs.' Post-Arg. Memo. at 1, No. 79-3269 (D.D.C. Feb. 15, 1980). It explained that the "Constitution expressly requires the enumeration of the 'whole number of persons in each State' for purposes of apportionment of Representatives to the United States Congress and none of plaintiffs' legal theories puts in doubt that the plain meaning of this language must be given effect," and that the Census "has never . . . excluded from the apportionment base any inhabitant counted in the decennial census." Defs.' Reply Memo. & Opp'n to Pls.' Mot. for Summ. J. at 1, No. 79-3269 (D.D.C. Jan. 30, 1980).

88. The Government also rejected any policy rationale for overriding the constitutional mandate to include all persons in the enumeration for purposes of congressional apportionment, noting that the "constitutionally mandated requirement to count states' inhabitants for apportionment purposes is a matter separate from the need to solve the problems of illegal immigration." *Id.*

89. Similarly, in a September 22, 1989 letter, Carol Crawford, the Assistant Attorney General for Legislative Affairs, advised Senator Jeff Bingaman that the Justice Department had "found no basis" for reversing its existing position that the Census Clause and Section 2 of the Fourteenth Amendment "require that inhabitants of States who are illegal aliens be included in the census count."[3]

90. More recently, in *New York v. Department of Commerce*, the Government argued in its Motion to Dismiss that the "Constitution supplies a simple judicial standard for determining the constitutionality of [Census Bureau] practices—the Secretary must perform a person-by-person headcount, rather than an estimate of population." Memo. of

[3] Letter from Assistant Attorney Gen. Carol T. Crawford to Honorable Jeff Bingaman (Sept. 22, 1989), *in* 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989).

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Law in Support of Defs.' Mot. to Dismiss at 25, No. 1:18-cv-02921, ECF No. 155 (S.D.N.Y. May 25, 2018). Similarly, it contended that "where, as here, there is no allegation that the Secretary failed to establish procedures for counting every person, a case ceases to implicate 'actual Enumeration . . . .'" Reply Memo. of Law in Further Support of Defs.' Mot. to Dismiss at 7, No. 1:18-cv-02921, ECF No. 190 (S.D.N.Y. July 13, 2018).

91. The Government embraced the requirement that every person living in the United States must be included in the Census even more directly in its Post-Trial Proposed Findings of Fact in *New York v. Department of Commerce*, writing that the "Constitution requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Pls.' Claims at 1, No. 1:18-cv-02921, ECF No. 546 (S.D.N.Y. Nov. 21, 2018) (internal citations omitted).

92. Even more recently, in ongoing litigation in Alabama over the inclusion of undocumented immigrants in the Census, the Government argued that "[t]he very purpose of the census . . . is to count the number of people residing in each state." Memo. of Law in Support of Defs.' Mot. to Dismiss at 1, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772, ECF No. 45-1 (N.D. Ala. Nov. 13, 2019).

3. The Statutory Requirements to Include All People in the Census for Purposes of Congressional Apportionment

93. Article I, Section 2 of the Constitution provides that the Census may be conducted "in such manner as [Congress] shall direct by law." Congress has codified this

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command in a statutory scheme primarily contained in Title 13 of the United States Code, also known as the Census Act.

94. Congress delegated to the Secretary of Commerce responsibility for conducting the Census, providing that he "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date' . . . ." 13 U.S.C. § 141(a).

95. Congress has also created the Census Bureau within the Department of Commerce and authorized the Secretary of Commerce to delegate his duties under the Census Act to the Census Bureau. 13 U.S.C. §§ 2, 4.

96. The Secretary must report to the President a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" within nine months of the Census date. 13 U.S.C. § 141(b).

97. The President then performs a "ministerial" calculation of the number of U.S. House seats to which each state is entitled. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). The President is "require[d]" to use only "data from the decennial census" to perform this calculation, *id.* at 797, and the calculation must use a specific formula with "rigid specifications . . . provided by Congress itself, and to which there can be but one mathematical answer." *Id.* at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5).

98. The President must then transmit to Congress, "[o]n the first day, or within one week thereafter, of the first regular session . . . a statement showing *the whole number of persons* in each State . . . as ascertained under the . . . decennial census of the population," and "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives *by the method*

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known as the method of equal proportions." 2 U.S.C. § 2a (emphases added). The "method of equal proportions" is the specific formula prescribed by Congress that calculates the number of House seats for each state based on the total population of each state as enumerated in the Decennial Census.

99. Though the primary purpose of the Census enumeration remains the apportionment of Congressional seats (as well as, by extension, Presidential electors), the population count from the Decennial Census is also used by the states for decennial redistricting of state legislative districts; helps to determine the distribution of hundreds of billions of dollars of federal funding; and informs the decisions of federal, state, and local policymakers and private businesses.

4. The Census Bureau's Repeated Acknowledgments that All People Must Be Included in the 2020 Census for Purposes of Congressional Apportionment

100. After more than a decade of preparation, the 2020 Census is currently being conducted, with "Census Day" having occurred on April 1. Beginning in January in some places, and in March nationwide, Americans were asked to respond to the Census questionnaire online, by phone, or by mail. And while there have been some delays due to the COVID-19 pandemic, in-person NRFU is currently scheduled to take place between August 11 and October 31.[4]

101. Throughout the entire process of preparing for and conducting the 2020 Census, the Census Bureau has consistently represented that it would adhere to the

[4] *See* Census Bureau, *Overall Timeline*, https://2020census.gov/en/important-dates.html (last visited July 21, 2020).

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centuries-old practice of counting every person living in the United States—including undocumented immigrants—for apportionment and other purposes.

102. In fact, the Census Bureau has formally adopted a rule—pursuant to a notice-and-comment rulemaking process—that undocumented immigrants must be counted where they live and included in apportionment numbers. On February 8, 2018, the Census Bureau promulgated its "Residence Rule" for the 2020 Census, which lays out this requirement. 83 Fed. Reg. 5525 (Feb. 8, 2018) (formally titled "Final 2020 Census Residence Criteria and Residence Situations.").

103. The Residence Rule explains that the "residence criteria" are "used to determine where people are counted during each decennial census." *Id.* at 5526. The Residence Rule indicates that the criteria for determining residency set forth in the rule must then be used "to apportion the seats in the U.S. House of Representatives among the states" and that "[a]pportionment is based on the resident population, plus a count of overseas federal employees, for each of the 50 states." *Id.* at 5526 n.1.

104. The Residence Rule provides that "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The Census Bureau elaborated that the "Census Bureau is committed to counting every person in the 2020 Census," including citizens of foreign countries living in the United States. *Id.* at 5526. The Census Bureau considered a comment which "expressed concern about the impact of including undocumented people

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in the population counts for redistricting because these people cannot vote."[5] In response, the Census Bureau declined to make any changes to its residence criteria and indicated that it "will retain the proposed residence situation guidance for foreign citizens in the United States." *Id.* at 5530.

105. As of July 21, 2020, a copy of these criteria was available unchanged on the Census Bureau website, including the provision for foreign citizens:[6]

3. **FOREIGN CITIZENS IN THE UNITED STATES**
   a) ***Citizens of foreign countries living in the United States*** - Counted at the U.S. residence where they live and sleep most of the time.
   b) ***Citizens of foreign countries living in the United States who are members of the diplomatic community*** - Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.
   c) ***Citizens of foreign countries visiting the United States, such as on a vacation or business trip*** - Not counted in the census.

106. As of July 21, 2020, a webpage maintained by the Census Bureau addressing "Frequently Asked Questions on Congressional Apportionment" noted that resident population counts "include all people (citizens and non-citizens) who are living in the United States at the time of the census," and explicitly affirmed that undocumented residents must be included in the population totals used for Congressional apportionment:[7]

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[5] Final 2020 Census Residence Criteria and Residence Situations, Federal Register, Vol. 83, No. 27, Thursday, February 8, 2018, https://www.govinfo.gov/content/pkg/FR-2018-02-08/pdf/2018-02370.pdf (last visited July 21, 2020).

[6] Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States*, https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last visited July 21, 2020).

[7] Census Bureau, Frequently Asked Questions on Congressional Apportionment, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q6 (last visited July 21, 2020).

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Who is included in the apportionment population counts?

The apportionment population count for each of the 50 states includes the state's total resident population (citizens and non-citizens) plus a count of the overseas federal employees (and dependents) who have that state listed as their home state in their employers' administrative records.

For details on who is counted (and where they are counted) in the 2020 Census, see the 2020 Census Residence Criteria and Residence Situations.

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Who is included in the resident population counts?

The resident population counts include all people (citizens and non-citizens) who are living in the United States at the time of the census. People are counted at their usual residence, which is the place where they live and sleep most of the time.

The resident population also includes military and civilian employees of the U.S. government who are deployed outside the United States (while stationed or assigned in the United States) and can be allocated to a usual residence address in the United States based on administrative records from the Department of Defense.

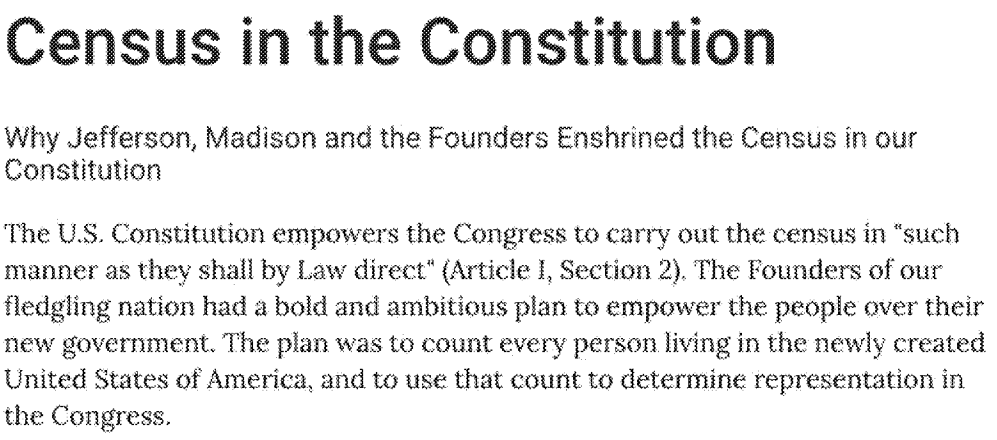
Are undocumented residents included in the apportionment population counts?

Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are included in the resident population for the census, which means they are all included in the apportionment counts.

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107. Likewise, as of July 21, the "Census in the Constitution" page on the Census Bureau website noted that "[t]he plan [of the Founders] was to count every person living in the United States of America, and to use that count to determine representation in Congress:"[8]

[8] Census Bureau, *Census in the Constitution*, https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html (last visited July 21, 2020).

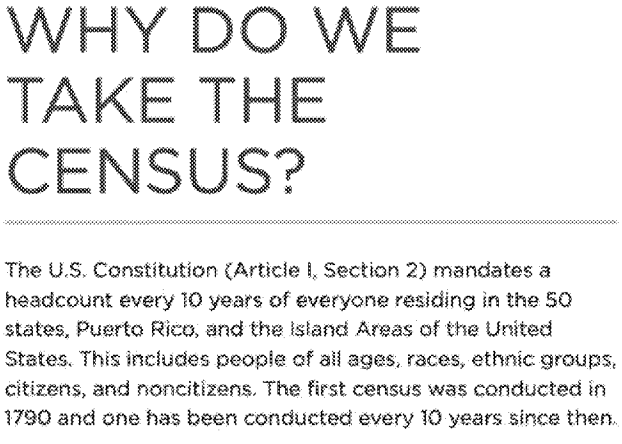


Census in the Constitution

Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution

The U.S. Constitution empowers the Congress to carry out the census in "such manner as they shall by Law direct" (Article I, Section 2). The Founders of our fledgling nation had a bold and ambitious plan to empower the people over their new government. The plan was to count every person living in the newly created United States of America, and to use that count to determine representation in the Congress.

108. Similarly, the Census Bureau's 2020 guide for Complete Count Committees, which are volunteer organizations designed to boost Census participation, advised that the Census "mandates a headcount every 10 years of everyone residing in the 50 states," including "citizens, and noncitizens:"[9]



WHY DO WE TAKE THE CENSUS?

The U.S. Constitution (Article I, Section 2) mandates a headcount every 10 years of everyone residing in the 50 states, Puerto Rico, and the Island Areas of the United States. This includes people of all ages, races, ethnic groups, citizens, and noncitizens. The first census was conducted in 1790 and one has been conducted every 10 years since then.

[9] Census Bureau, *2020 Census Complete Count Committee Guide* at 1 (2018), https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf (last visited July 21, 2020).

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109. Similarly, on its webpage "Setting the Record Straight," as of July 21, 2020, the Census Bureau assured readers that "[e]veryone counts" and that "everyone living" in the United States, including non-citizens, is counted in the 2020 Census:[10]

Setting the Record Straight

Does the 2020 Census ask about citizenship status?

NO. The 2020 Census does not ask whether you or anyone in your home is a U.S. citizen.

Are non-citizens counted in the census?

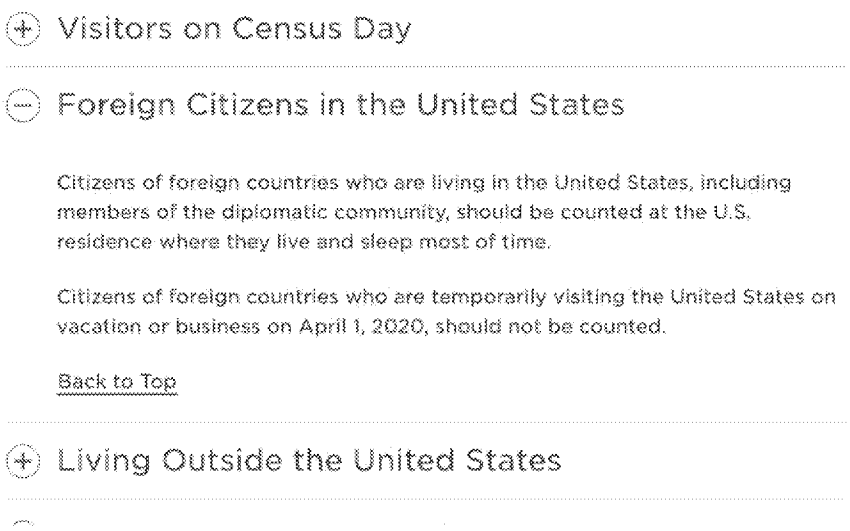
YES. Everyone counts. The 2020 Census counts everyone living in the country, including non-citizens. Learn more about who should be counted when you complete the 2020 Census.

110. As of July 21, the Bureau's "Who to Count" page repeated the same information:[11]

[10] Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html (last visited July 21, 2020).

[11] Census Bureau, *Who to Count*, https://2020census.gov/en/who-to-count.html (last visited July 21, 2020).

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111. And, as of July 21, the "Who Is Required to Respond" page on the Census Bureau's website for the 2020 Census also specified that "[e]veryone living in the United States . . . is required by law to be counted in the 2020 Census:"[12]



112. The 2020 Census is in process, but at this point remains far from enumerating the entire population. As of July 23, 2020, 62.3% of households in the United States have responded to the 2020 Census, according to the Census Bureau's estimates.[13] Included within this figure are likely significant numbers of undocumented immigrants who acted in good faith according to the Bureau's own instructions and

[12] Census Bureau, *Who Is Required to Respond*, https://2020census.gov/en/am-i-required.html (last visited July 21, 2020).

[13] Census Bureau, *Response Rates*, https://2020census.gov/en/response-rates.html (last visited July 21, 2020).

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responded to the census, with the understanding that they would be counted just like every other person living in the United States.

B. Defendants' First Attempt to Exclude Noncitizens from the Census: The Citizenship Question Litigation

113. This is not the first effort by Defendants to exclude noncitizens from the 2020 Census. Most notably, following the Secretary's March 2018 announcement that a citizenship question would be included on the Census, numerous plaintiffs, including Plaintiffs here, filed suit to block the question. After an eight-day bench trial, this Court issued a 277-page opinion and order including its findings of fact and conclusions of law. *See New York*, 351 F. Supp. 3d 502. The Court concluded that Plaintiffs had standing to sue because the inclusion of a citizenship question on the Census would deter participation in the Census by households with a noncitizen, leading to an undercount of such households, and that Defendants violated the Administrative Procedure Act in various ways, including by offering a "pretextual" rationale, *id.* at 516—Voting Rights Act ("VRA") enforcement—for the Secretary's decision. *Id.* at 516.

114. The Supreme Court affirmed, finding that the Secretary's VRA rationale was "incongruent with what the record reveal[ed] about the agency's priorities and decision-making process" and "contrived." *Dep't of Commerce*, 139 S. Ct. at 2575-76. The Secretary's March 2018 decision thus failed the basic requirement that agencies "pursue their goals reasonably," and was unlawful. *Id.* at 2576.

115. The Secretary's "contrived" pretext was pierced during discovery in a separate state court lawsuit, *Common Cause v. Lewis*, No. 18-CVS-14001 (N.C. Super. Ct.), where information that had been wrongfully concealed in discovery before this

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Court revealed the true genesis of the decision to add a citizenship question to the 2020 Census. The evidence was discovered on the hard drive of Dr. Thomas Hofeller, a North Carolina-based longtime Republican strategist and redistricting expert who died in August 2018.[14]

116. In late August 2015, Hofeller was commissioned by the Washington Free Beacon, a conservative website, to study the "practicality" and "political and demographic effects" of using citizen voting age population ("CVAP") instead of total population ("TPOP") to achieve equal population in redistricting.[15] Hofeller advised that if a citizenship question were added to the 2020 Decennial Census so as to enable the exclusion of non-citizens from the population base in redistricting, the results "would be advantageous to Republicans and Non-Hispanic Whites."[16]

117. Documents also revealed that Hofeller in 2015 communicated directly with Census Bureau official Christa Jones, using her private email address, and that Jones notified Hofeller of the Federal Register's notice for comment regarding the Census Bureau's Content Test for that year, suggesting that there was "an opportunity to mention citizenship."[17] Hofeller subsequently helped ghostwrite a draft DOJ letter to Commerce

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[14] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Apr. 21, 2018) https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

[15] Pls.' Mot. for Order to Show Cause Ex. C at 1-2, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[16] Pls.' Mot. for Order to Show Cause Ex. D at 9, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[17] Tara Bahrampour, *GOP strategist and census official discussed citizenship question, new documents filed by lawyers suggest*, Wash. Post (June 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-

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requesting a citizenship question that subsequently came into the possession of his "good friend[]" Mark Neuman, Defendant Secretary Ross's "trusted" and "expert adviser" on census issues, who "act[ed] analogously to an agency employee."[18] Following a call between then-North Carolina Congressman (and now Defendant Trump's Chief of Staff) Mark Meadows and Defendant Secretary Ross, senior aides of Secretary Ross facilitated a meeting at which Neuman provided Hofeller's draft to John Gore, the Acting Assistant Attorney General for Civil Rights, who ultimately "requested" that the Bureau include a citizenship question on the census.[19] Meanwhile, Jones eventually came to serve as Chief of Staff to the Acting Director of the Census Bureau at the time of Defendant Secretary Ross's March 2018 Decision Memorandum ordering the inclusion of a citizenship question on the census. Jones later testified that Hofeller favored adding a citizenship question to the census to aid "the Republican redistricting effort" and that Hofeller's business partner, Dale Oldham, advocated for a citizenship question for redistricting and apportionment purposes "more times than I can remember."[20]

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connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/.

[18] NYIC Pls.' Mot for Sanctions, 1:18-cv-2921 (JMF), ECF No. 635-1 at 124-136; Def's Opp. to Ltr. Mot. to Compel, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 451 at 3 (S.D.N.Y. Oct. 30, 2018).

[19] Pls.' Joint Proposed Post-Trial Findings of Fact, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 545 at 52-53 ¶¶ 364-69 (S.D.N.Y. Nov. 21, 2018) (citing trial exhibits).

[20] Memorandum from Acting Chairwoman Carolyn B. Maloney to Members of the United States House Committee on Oversight, *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress*, 12 (Nov. 12, 2019) https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf.

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118. Subsequent statements by Defendant Trump and other Administration officials and advisors confirmed that a discriminatory intent to exclude noncitizens—and particularly, undocumented immigrants—from redistricting was the actual purpose of the effort to add a citizenship question to the Census.

119. For example, on July 1, 2020, Defendant Trump stated that a citizenship question was "very important to find out if someone is a citizen as opposed to an illegal," and that "Democrats want to treat the illegals, with healthcare and other things, better than they treat the citizens of this country."[21]

120. Defendant Trump himself has repeatedly admitted that his administration sought to add the citizenship question to harm immigrant communities by excluding them from the decennial enumeration and thus from redistricting and apportionment. About a week after the Supreme Court's holding in *Department of Commerce*, Defendant Trump, asked why he was still trying to get a citizenship question on the census, said: "Number one, you need it for Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going? How many people are there?"[22]

121. Days later, at a press conference in the White House Rose Garden, Defendant Trump similarly stated that the citizenship information his administration sought is "relevant to administering our elections. Some states may want to draw state

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[21] *Remarks by President Trump at Signing of H.R. 3401*, White House (July 1, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/.

[22] Remarks by President Trump Before Marine One Departure, White House (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/).

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and local legislative districts based upon the voter-eligible population."[23] In particular, Defendant Trump urged states to apportion and redistrict on the basis of citizen voting age population instead of total population, as Hofeller had advised, because he suggested that the move might be immune from judicial scrutiny: "Indeed, the same day the Supreme Court handed down the census decision, it also said it would not review certain types of districting decisions, which could encourage states to make such decisions based on voter eligibility."[24]

122. At the same press conference, Defendant Trump stated: "As shocking as it may be, far-left Democrats in our country are determined to conceal the number of illegal aliens in our midst. They probably know the number is far greater, much higher than anyone would have believed before. Maybe that's why they fight so hard. This is part of a broader left-wing effort to erode the rights of the American citizen."[25]

123. Several of Defendant Trump's associates and agents also stated—in the wake of the Supreme Court's ruling in *Department of Commerce*—that excluding noncitizens from the census is necessary either to curtail immigration or limit the political power of immigrant communities of color.

124. Matt Schlapp, Chairman of the American Conservative Union and husband to Mercedes Schlapp, Defendant Trump's Director of Strategic Communications, tweeted on June 27, 2019 that he wanted to "impeach[] the Chief

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[23] *Remarks by President Trump on Citizenship and the Census*, White House (July 11, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[24] *Id.*

[25] *Id.*

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Justice [Roberts]" for "angling for vast numbers of illegal residents to help Dems hold Congress."[26]

125. Former Vice Chair of the President's Commission on Electoral Integrity and anti-immigrant zealot Kris Kobach stated on July 8, 2019 that he "advised the President on putting the citizenship question back on the U.S. Census," adding that he wanted to "make it a requirement in federal law that we must ask the question in every census going forward."[27] A supplement to the Administrative Record in the citizenship question litigation revealed that Secretary Ross (at the behest of former White House senior advisor Steve Bannon) had discussed adding a citizenship question with Kobach, who advised that the question's absence on the census "leads to the problem that aliens … are still counted for congressional apportionment purposes." In separate public statements, Kobach reiterated that the purpose of adding a citizenship question to the census was "so Congress [can] consider excluding illegal aliens from the apportionment process,"[28] because "citizens in a district with lots of illegal aliens have more voting power than citizens in districts with few illegal aliens."[29]

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[26] Matt Schlapp (@mschlapp),, Twitter (June 27, 2019, 8:29 AM), https://twitter.com/mschlapp/status/1144266564935528449.

[27] Pilar Pedraza (@PilarPedrazaTV), Twitter (July 8, 2019), https://twitter.com/PilarPedrazaTV/status/1148296658943381508.

[28] Kris Kobach, *Exclusive—Kobach: Bring the Citizenship Question Back to the Census*, Breitbart (Jan. 30, 2018), http://www.breitbart.com/big-government/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/.

[29] Kris Kobach, *Why the Citizenship Question is So Important*, Breitbart (June 27, 2019), https://www.breitbart.com/politics/2019/06/27/kobach-why-the-citizenship-question-is-so-important/.

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126. Defendant Trump has also repeatedly denigrated and dehumanized non-white immigrants. He has stated that certain immigrants "aren't people, these are animals,"[30] and his administration has housed immigrant children in cages and separated them from their families.[31] Indeed, Defendant Trump has long complained about the growth of immigrant communities of color, tweeting in 2015: "How crazy - 7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[32]

127. Secretary Ross has publicly supported the Trump Administration's anti-immigrant agenda, applauding Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse, and chain immigration."[33]

128. This slew of public statements and actions—from Defendant Trump and some of his highest-level advisers and administration officials—shows clearly that the true rationale for a adding a citizenship question is driven by racial animus against immigrants of color and a desire to curb the political power of immigrant communities of color.

C. The Presidential Memorandum to Exclude Undocumented Immigrants from the Census

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[30] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[31] BBC, *Trump migrant separation policy: Children 'in cages' in Texas*, June 18, 2018, BBC News, https://www.bbc.com/news/world-us-canada-44518942.

[32] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[33] Press Release, Commerce Dep't, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps.

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129. Where subterfuge has failed, Defendants have now turned to executive fiat. Barred from including a citizenship question on the 2020 Census, Defendants have now contrived a new scheme to identify and directly exclude undocumented immigrants from the Actual Enumeration required for apportionment. On July 21, 2020, Defendant Trump issued a presidential memorandum to the Secretary of Commerce entitled, "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census."[34]

130. The Memorandum wrongly asserts that "[t]he Constitution does not specifically define which persons must be included in the apportionment base," that "persons in each state" has been interpreted to mean "inhabitants," that the scope of the term "inhabitants" requires "the exercise of judgment," and that the President purportedly has discretion to exercise that judgment to exclude entire categories of persons who reside in the United States. *Id.*

131. On this asserted legal basis, the Memorandum declares that for reapportionment following the 2020 Census, "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* § 2.

132. The Memorandum states that the Secretary, in submitting his Census report under 13 U.S.C. § 141(b), "shall take all appropriate action, consistent with the

[34] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/.

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Constitution and other applicable law" to provide information to the President to allow for the exclusion of undocumented immigrants. *Id.* § 3.

133. By its explicit and emphatic declaration of federal policy, the Memorandum directs the Commerce Department (and through the Commerce Department, the Census Bureau) to take steps to allow the President to exclude undocumented immigrants in his apportionment report to Congress issued under 2 U.S.C. § 2(a). *Id.* This includes, but is not limited to, "provid[ing] information" in the report that the Secretary must provide to the President under 13 U.S.C. § 141(b) that will "permit[] the President" to exclude undocumented immigrants in calculating the number of U.S. House seats to which each state is entitle. *Id.*

134. The Memorandum asserts that excluding undocumented immigrants is justified because "the principles of representative democracy" are undermined by tying the political influence of states to a population that includes undocumented immigrants. Memorandum, § 2.

135. In an accompanying statement, Defendant Trump declared that the Memorandum followed through on his commitment to determine the citizenship status of the population, and argued that "the radical left is trying to erase the existence of [the concept of American citizenship] and conceal the number of illegal aliens in our country" as "part of a broader left-wing effort to erode the rights of Americans [sic] citizens."[35] The statement repeated the Memorandum's argument that counting undocumented

[35] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

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immigrants creates "perverse incentives," and that "we should not give political power to people who should not be here at all."[36]

136. Upon information and belief, following receipt of the Memorandum, the Department of Commerce has issued directives to the Census Bureau, constituting final agency action, to implement the policy of excluding noncitizens from the enumeration used for congressional apportionment, as set forth in the Memorandum.

137. On June 23, 2020, Defendant Trump's re-election campaign sent an email making plain that the intent of the Memorandum is to undermine the Census and demonize immigrants. The email characterized the Memorandum as an "Executive Order" that "will block" undocumented people from "receiving congressional representation" and from "being counted in the U.S. Census."[37] The email claimed that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens."[38]

D. The Effect of Excluding Undocumented Immigrants from the Census

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[36] *Id.*

[37] Hansi Lo Wang (@hansilowang), TWITTER (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672.

[38] *Id. See also* Tara Bahrampour, *Trump's reelection campaign calls for adding citizenship question to 2020 census amid criticism that he is politicizing the count*, Wash. Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html (describing a "Trump reelection campaign" email that asked supporters whether they "support[ed] the president in adding a citizenship question" to the Census and noting that critics described the email as "demoralizing," "an assault on the constitution," and "a sly attempt to rally the president's base").

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138. Pew Research Center has estimated that the total population of undocumented immigrants in the United States was 10.5 million people in 2017.[39] The Department of Homeland Security (DHS) has estimated that the total population of undocumented immigrants in the United States was 12 million in 2015.[40]

139. California, Texas, and New York are consistently three of the states with the largest populations of undocumented residents.

140. According to Pew Research Center, California had 2 million undocumented residents, Texas had 1.6 million undocumented residents, and New York had 650,000 undocumented residents in 2017, subject to an upward or downward variance of 50,000 people for each estimate.[41]

141. According to DHS, California had 2.9 million undocumented residents, Texas had 1.9 million undocumented residents, and New York had 590,000 undocumented residents in 2015.[42]

142. The current average population of each U.S. House district is 710,767 people.

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[39] Jeffrey S. Passel and D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Ctr. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.

[40] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[41] Passel and Cohn, *supra* note 38.

[42] Office of Immigration Statistics, *supra* note 46.

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143. The Memorandum expressly aims to alter Congressional apportionment based on states' undocumented populations. For example, it argues that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." Memorandum§ 2.

144. Of these states, the Memorandum specifically targets California, anticipating that excluding undocumented immigrants from the census would deprive California of multiple House seats (an thus, Electoral College votes). The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* Upon information and belief, this "one State" is California.

145. Unlawfully excluding undocumented residents from the population count used for apportionment will likely deprive several states—most particularly, Arizona, California, New York, and Texas—of at least one House seat (or will cause not to gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process.

146. Indeed, this Court found that Arizona, California, Florida, Illinois, New York, and Texas all faced a substantial certainty of losing a seat based on a differential undercount of 5.8% of all noncitizens in the 2020 census. *New York*, 351 F. Supp. 3d at 594, *aff'd in relevant part*, 139 S. Ct. 2551. The evidence upon which the Court based these findings—the testimony of Dr. Chris Warshaw—relied on smaller undercounts of

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noncitizens in each of these states than would be caused by the Memorandum. *See id.* (citing Warshaw Decl., Dkt. No. 526-1). A greater impact will occur for these states if ***100%*** of undocumented immigrants are removed from the apportionment count. Other studies have also confirmed the certainty that various states would lose a seat if undocumented residents are removed.[43]

147. But the effects of the Memorandum are likely to run even deeper. Like the failed effort to add a citizenship question to the census, the new policy of excluding undocumented immigrants from the census will broadcast a xenophobic message to immigrant communities about census participation, suppressing responses from households containing immigrants and noncitizens. This will result in the omission from the census not only of undocumented immigrants, but also noncitizen immigrants with legal status and United States citizens. The resulting undercount will harm the work of organizations—including that of the Plaintiffs here—in promoting census participation and will further strip representation and economic resources from communities with immigrant populations.

E. The Census Bureau's Likely Use of Statistical Modeling to Estimate the Undocumented Population

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[43] *See* Amelia Thomson-DeVeaux, *The Citizenship Question Could Cost California And Texas A Seat In Congress*, FiveThirtyEight (June 17, 2019), https://fivethirtyeight.com/features/the-citizenship-question-could-cost-california-and-texas-a-seat-in-congress/ (finding California, Arizona, and Texas would lose at least one seat in a poorly conducted census and 10% of households with undocumented immigrants undercounted). While there are questions about the accuracy of its expert's methodology, the State of Alabama has asserted essentially the same thing in separate litigation. *See* Expert Report of Dudley Poston at 28, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-00772-RD (N.D. Ala.) (opining that excluding undocumented residents from apportionment base would cause California, Texas, and New Jersey to lose seats).

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148. The Census Bureau does not have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction.

149. After completion of the citizenship question litigation, the Census Bureau indicated that it would seek to compile citizenship status information for Census respondents by using administrative records, including records from the Social Security Administration. Such administrative records, however, do not provide information as to *legal status*, as opposed to citizenship, and cannot be used to determine whether census respondents are *undocumented immigrants* specifically.

150. In fact, the Government has recently represented in separate litigation, via a declaration by Census Bureau Senior Advisor Enrique Lamas, that it "lack[s] . . . accurate estimates of the resident undocumented population" on a state-by-state basis.[44]

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[44] Defendants' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *State of Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020). *See also* Jeffrey Mervis, *Why the U.S. Census Bureau could have trouble complying with Trump's order to count citizens*, Science Mag. (Sept. 16, 2019), https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-trouble-complying-trump-s-order-count-citizens (detailing the "formidable challenge" in relying on administrative records); Comment from Campaign Legal Center, OMB Control Number 0607-0995, https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf (noting that "[s]tate administrative data on individual citizenship status are notoriously riddled with errors and outdated information" and "records misidentify naturalized U.S. citizens as non-U.S. citizens"); Jennifer Van Hook, *Counting 11 million undocumented immigrants is easier than Trump thinks*, The Conversation (July 17, 2019), https://theconversation.com/counting-11-million-undocumented-immigrants-is-easier-than-trump-thinks-120459 (observing that administrative records provide "inconsistent information about the same person," have "limited value for describing those who fall outside of the administrative records system," and will require researchers to "make assumptions about coverage error").

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151. In the absence of means to actually enumerate the total population of the United States minus undocumented immigrants, the Government has indicated its intention to use statistical modeling to estimate the undocumented population and thereby calculate an apportionment population that excludes undocumented immigrants. In separate litigation, Department of Justice attorney Stephen Ehrlich recently stated in a hearing that "there may need to be some statistical modeling" in order to carry out the Memorandum, though the Government had not yet "formulated a methodology."[45]

152. This statement is consistent with the previous efforts of governmental and non-governmental actors that have endeavored to project the population of undocumented immigrants in the United States. For example, Pew Research Center compiles statistical estimates of the population of undocumented immigrants rather than an actual enumeration, making a variety of statistical adjustments to the census population numbers and weighting the data.[46] DHS has similarly used statistical sampling methodology, the residual method, for estimated the populations of undocumented immigrants. [47]

153. The scope of any statistical model required to estimate the number of undocumented immigrants would be unprecedented for use in calculating the

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[45] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985

[46] *See*, J. Passel, *Measuring illegal immigration: How Pew Research Center counts unauthorized immigrants in the US* (July 12, 2019), https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/.

[47] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. DHS has not performed any estimates of the population of undocumented immigrants for any year since 2015.

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apportionment population. Such statistical processes are not an "actual Enumeration" as required under Article I of the Constitution. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 (1999); *id.* at 346 (Scalia, J., concurring) ("It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling.").

CAUSES OF ACTION

COUNT ONE
Violation of Enumeration and Apportionment (Article I, Section 2, Clause 3 of the Constitution, and Section 2 of the Fourteenth Amendment) (All Plaintiffs against All Defendants)

154. Plaintiffs repeat and re-allege by reference all of the previous allegations in this Complaint.

155. The Constitution requires that the apportionment of seats for the House of Representatives be conducted on the basis of the total population of all persons in each state, following each Decennial Census.

156. In particular, Article I, Section 2 of the Constitution requires 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," "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

157. Section 2 of the Fourteenth Amendment provides that "Representatives shall 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 (emphasis added).

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158. "Whatever his status under the immigration laws, an alien is . . . a 'person'" for purposes of the Fourteenth Amendment. *Plyler*, 457 U.S. at 210. A "person" means a "human being," *Black's Law Dictionary* (11th ed. 2019), and no matter what the Trump Administration may say, undocumented immigrants are human beings. Undocumented immigrants living in the United States are among the "whole number of persons in each State," U.S. Const. amend. XIV, § 2, and thus the plain and unequivocal text requires counting undocumented immigrants in the total population base used for Congressional apportionment.

159. The Supreme Court has definitively held that non-citizens must be included in the population base used to apportion U.S. House seats to each state. The Court held just four years ago that "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including non-citizens. *Evenwel*, 136 S. Ct. at 1129; *see also id.* at 1128 ("The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.").

160. Other courts, including this Court, have recognized the same. *See, e.g.*, *New York*, 351 F. Supp. 3d at 514 ("[T]he Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and "[t]he. population count derived from that effort is used . . . to apportion Representatives among the states"); *Klutznick*, 486 F. Supp. at 576 ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for

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apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'").

161. The Memorandum brazenly ignores this precedent and the plain text of the Constitution. It purports to unilaterally declare that undocumented immigrants are not "persons" under the Fourteenth Amendment. Based on that shocking and baseless assertion, the Memorandum declares it to be the explicit policy of the United States "to exclude from the apportionment base aliens who are not in a lawful immigration status." The Memorandum further directs the Secretary to provide the President with information in his Census report that excludes undocumented immigrants from the population count of each state, so as to permit the President to exclude such persons in reporting to Congress the number of each representatives to which each State is entitled, which the President will then do.

162. By denying undocumented immigrants are "persons" and excluding them from the total population count for congressional apportionment, the Memorandum violates the plain and straightforward command of the Enumeration Clause and the Fourteenth Amendment, as well as binding Supreme Court precedent.

163. The Memorandum further violates the Enumeration Clause and the Fourteenth Amendment by apportioning U.S. House seats among the states based on data other than the "numbers" reflecting the total population of each state as determined by the "actual Enumeration" of the Decennial Census.

164. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to each receive at least one fewer seat in

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the House of Representatives. Because these states will have at least one fewer congressional district than they would otherwise, each congressional district in these states will encompass more total people than it would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

165. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute substantial portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

166. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. at 2565–66; *Utah v. Evans*, 536 U.S. 452, 464 (2002); *U.S. House of Representatives*, 525 U.S. at 329–34.

COUNT TWO
Violation of Census Act
(2 U.S.C. § 2a(a); 13 U.S.C. § 141)
(*Ultra Vires*)

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167. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

168. Congress has required that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" 13 U.S.C. § 141(a). "The tabulation of total population by States under subsection (a) of [§ 141] *as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b) (emphasis added).

169. In turn, "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and 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." 2 U.S.C. § 2a(a).

170. As the Supreme Court and the Census Bureau have recognized, these statutes require that persons whose "usual residence" is in the United States must be counted in the enumeration and apportionment of U.S. House seats at that "usual residence." "[T]he first census conducted in 1790 required that persons be allocated to their place of 'usual residence,'" and "'usual residence' has continued to hold broad connotations" through present day. *Franklin*, 505 U.S. at 803, 805. The Census Bureau has confirmed that its official policy today is that "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of

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'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time." Residence Rule, 83 Fed. Reg. at 5526.

171. Under the Census Bureau's Residence Rule, "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533.

172. The President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary of Commerce to tabulate and transmit reports to the President estimates of the total population in each State that are based on data other than the actual Enumeration of each state as determined by the decennial census, and that do not count all persons who live in the state as their "usual residence." Specifically, the President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary to rely on administrative data other than the actual Enumeration of each state as determined by the decennial census, and to exclude undocumented immigrants who reside in a state as their usual residence, in tabulating the total population of each state and transmitting those total population numbers to the President.

173. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by requiring the President to calculate and transmit to Congress total population figures for each state, and the apportionment of U.S. House seats among the states, based on data other than "decennial census of the population," and by using a method other than the "method of equal proportions" prescribed by Congress. 2 U.S.C. § 2a(a). The President may use only the actual enumeration of the total population of each State as "ascertained under the . . . decennial census"—and nothing else—to calculate the whole number of persons in each State and the number of Representatives for each state.

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2 U.S.C. § 2a(a). Likewise, the "method of equal proportions" is a "rigid" formula "provided by Congress itself" that requires use of the total population of each State as determined based on the decennial census and no other administrative data. *Franklin*, 505 U.S. at 2775.

174. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by causing the President to transmit to Congress total population figures for each state that do not include all persons who live in each state as their "usual residence," and/or by causing the President to transmit to Congress a number of Representatives for each state that is calculated by excluding persons who live in each state as their "usual residence." If the Secretary of Commerce transmits one set of total population numbers to the President that *do* include undocumented immigrants who live in the United States as their usual residence (as the Secretary must do), then the President is required to use *that* set of total population numbers in transmitting to Congress "the whole number of persons in each State," and "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." 2 U.S.C. § 2a(a). The number of whole of persons in each state that the President must transmit to Congress must be that "ascertained under the . . . decennial census of the population," *id.*, which includes all persons living in the United States as their usual residence, 13 U.S.C. § 141(a)–(b). And it is "required for the apportionment of Representatives in Congress among the several States" that the President and the Secretary use the total population numbers tabulated for each state that include all persons who live in each state as their usual residence. 13 U.S.C. § 141(b).

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175. Because Defendant Trump and Secretary Ross will act beyond the scope of their statutory authority in a way that causes constitutional violations, they are acting *ultra vires* pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141. *See, e.g.*, *Mountain States Legal Foundation v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) ("[T]he Supreme Court has indicated generally that review is available to ensure that Proclamations are consistent with constitutional principles and the President has not exceeded his statutory authority."); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority. . . . That the executive's action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

176. The Memorandum also will result in the President and Secretary Ross failing to perform their clear legal duties to, among other things: tabulate the total populations of the States based on data from the decennial census that includes all persons who live in the United States as their usual residence; calculate the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence; and transmit to Congress the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence.

177. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives.

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Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

178. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

179. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT THREE
Discrimination on the Basis of Race and National Origin
(Fifth and Fourteenth Amendments of the U.S. Constitution)
(All Plaintiffs against All Defendants)

180. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

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181. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the federal government not deny people the equal protection of its laws and prohibits the federal government from discriminating against individuals in the United States on the basis of race, ethnicity, national origin, and citizenship. U.S. Const. amend V.

182. The Supreme Court has affirmed the clear text of the Fifth Amendment by recognizing its constitutional protections apply to "person[s]" within the jurisdiction of the United States, and not only to citizens. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (Field, J., concurring) ("[t]he term 'person,' used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic"); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

183. The Fifth Amendment's Due Process Clause "applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

184. The "bedrock protections of the Fifth Amendment's Due Process Clause" are not eliminated by the "mere act of entry into the United States without documentation." *Garza v. Hargan*, 874 F.3d 735, 737–38 (D.C. Cir. 2017) (Millett, J., concurring).

185. The Fifth Amendment's prohibition on discrimination on the basis of race, ethnicity, national origin, and citizenship is co-extensive with the Equal Protection guarantees of the Fourteenth Amendment, which the Supreme Court has long recognized extends to undocumented immigrants. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [and is] universal in [its] application, to

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all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In more recent years, the Supreme Court has reaffirmed that "aliens whose presence in this country is unlawful . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210.

186. The Memorandum violates the Fifth Amendment's prohibition on discrimination in at least two distinct respects. First, it facially targets undocumented immigrants for exclusion from the decennial enumeration, outright denying them the status of "persons" under the Constitution. Government action denying the *personhood* of people living in the United States echoes the darkest chapters of American constitutional history. *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

187. Second, as with the failed scheme to include a citizenship question on the census, this latest discriminatory act is motivated by a bare desire to harm immigrant communities of color, and particularly Latinx communities, by reducing their political clout and access to federal resources.

188. Defendant Trump and nativist members of his Administration view non-white, undocumented immigrants as a political and cultural threat. The President, as noted *supra*, has directed particularly virulent animus at Latinx immigrants. Defendant Trump and members of his Administration have long warned about the consequences of rising Latinx political power in the United States and the ostensible harms of undocumented immigrants to the United States.

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189. The Memorandum not only would codify the animus and discriminatory goals of Defendants, but it would result in a cascade of discriminatory effects, including, but not limited to:

a. The loss of congressional seats and Electoral College votes in states where these groups constitute significant portions of the population and where Plaintiffs have members, including a certainly impending loss for California; a substantial risk of a loss for New York, Texas, Florida, Arizona, and Illinois; and a considerable risk of a loss for New Jersey and Georgia; and

b. A substantial reduction in the amount of federal funds distributed to the local and state governments in which the Plaintiffs reside, which all have significant, non-white populations; and

c. A reduction of the political influence to which these communities would receive through an accurate census count.

190. In addition to the discriminatory effects evidence well-known and acted upon by Defendants and the direct intent evidence outlined, the haphazard process through which the Defendants promulgated this Memorandum provides strong circumstantial evidence of discriminatory intent. This evidence includes the timing of the release of the Memorandum, which coincides with dispatching of Census field operations to conduct outreach to groups the Defendant Trump has discouraged from participating with dark and racist presidential campaign statements; the bizarre procedural sequence and series of events leading up to the Memorandum; the President's repeated efforts to generate confusion surrounding and distrust of the Census process; the shallow justifications cited by the President for the memorandum; the historical background and

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substantive departures from prior precedents; contemporary statements of the President and other decisionmakers; and the profound unworkability of the Memorandum.

191. Defendants' violations of the Fifth Amendment will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

192. Defendants' violations of the Fifth Amendment also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

193. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

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COUNT FOUR
Separation of Powers
(Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment)
(All Plaintiffs against Defendant Trump)

194. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

195. Article I of the U.S. Constitution, in conjunction with the Fourteenth Amendment, requires that the federal government conduct an "actual Enumeration" of the national population every ten years to determine the "whole number of persons" in the United States and within each state for the purpose of apportioning members of the House of Representatives to the respective states according to their population. U.S. Const. art I, § 2, cl. 3; *id.* amend. XIV, § 2.

196. The Constitution, through the Enumeration Clause, "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Dep't of Commerce*, 139 S. Ct. at 2566 (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)).

197. As the Supreme Court has noted repeatedly, through the Census Act, Congress "delegated to the *Secretary of Commerce* the tasks of conducting the decennial census 'in such form and content as he may determine,'"—not the President. *Id.* at 2567 (quoting 13 U.S.C. § 141(a)).

198. The text of the Census Act itself makes clear that Congress has delegated authority over the census to the *Commerce Secretary*, not the *President*.

199. Section 141(a) of the Census Act requires that "*[t]he Secretary shall*, in the year 1980 and every 10 years thereafter, take a decennial census of population as of

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the first day of April of such year, which date shall be known as the 'decennial census date', *in such form and content as he may determine*"—not the President. 13 U.S.C. § 141(a) (emphasis added).

200. Section 4 of the Census Act requires the Secretary, *not* the President, to "perform the functions and duties imposed upon him by this title." 13 U.S.C. § 4.

201. The Census Act plainly distinguishes between the Secretary and the President in their roles regarding the Census, as intended by Congress. *See, e.g.*, 13 U.S.C. § 141(b) ("The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported *by the Secretary to the President* of the United States.") (emphasis added); 13 U.S.C. § 21 (distinguishing between "the President" and "the Secretary").

202. The Constitution and Census Act thus make clear that the President has usurped powers Congress has delegated to the Secretary. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

203. The Constitution and Census Act are unambiguous: Congress has constitutional authority over the census, and it has delegated none of that authority to the President. The Memorandum therefore violates the Constitution's separation of powers.

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204. Defendants' constitutional violation causes ongoing harm to Plaintiffs and their members because as explained their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the populations; and provide services to undocumented immigrants, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

205. The Supreme Court has stated, "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Bond v. United States*, 564 U.S. 211, 222 (2011).

206. Defendants' violations of the constitutional separation of powers will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would other, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

207. Defendants' violations of the constitutional separation of powers also causes harm to Plaintiffs and their members because, as explained, some of their

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members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

208. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT FIVE
Administrative Procedure Act
(All Plaintiffs against Defendants Ross, Dillingham, Department of Commerce and Census Bureau)

209. Plaintiffs repeat and re-allege by reference all of the previous factual allegations in this Complaint.

210. The Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, provides for a cause of action against any final agency action, within the meaning of the APA.

211. Upon information and belief, the Department of Commerce has directed the Census Bureau to effectuate the Memorandum's policy of excluding noncitizens from the enumeration used to apportion congressional representation and has instructed the Census Bureau to that effect. This constitutes a final agency action within the meaning of the APA because it marks the consummation of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

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212. In addition, the Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President is required under the Memorandum, and thus the fact that the Secretary will take these actions is indisputable and inevitable. The Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President are separate final agency actions within the meaning of the APA. Requiring Plaintiffs to challenge those mandated final actions after they occur could enable Defendants to evade judicial review.

213. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

214. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum also violates the APA because it is contrary to statutory and constitutional law. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

215. The Census Act requires that this decennial census result in a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" to be reported to the President. 13 U.S.C. § 141(b). This statute has identical meaning as the Constitution, whose mandate it implements: undocumented immigrants are included in the "total population" of each state, and thus must be included in the Census. The statute governing reapportionment, 2 U.S.C. § 2a, provides that after within one week of the first day of the first regular

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session of each Congress following the Census – that is, after receiving the Secretary of Commerce's report pursuant to 13 U.S.C. § 141(b) – the President shall transmit to Congress the population of each state and the number of seats to which it is entitled in the House of Representatives. Like the Census Act, this statute implements the Constitution's requirement that apportionment be based on the total population of each state by mandating that the President's statement to Congress show "the whole number of persons in each State . . . ." 2 U.S.C. § 2a(a). Undocumented immigrants are included within the "whole number of persons in each State" as used in 2 U.S.C. § 2a(a).

216. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because: it relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; and offered an explanation for its decision that runs counter to the evidence before the agency. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

217. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because it changed long-standing, consistent Census Bureau policy without a "reasoned analysis of the change." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

218. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the

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Memorandum is also arbitrary and capricious in violation of the APA because it is the subject of improper political influence and pressure from political actors. *D.C. Fed'n of Civic Assoc. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

219. The Memorandum further violates the APA by effectively abrogating the Residence Rule without going through notice-and-comment rulemaking. The Census Bureau issued the Residence Rule pursuant to notice-and-comment rulemaking. The Census Bureau provided in the Residence Rule that foreign citizens must be "[c]ounted at the U.S. residence where they live and sleep most of the time," 83 Fed. Reg. at 5533, and the Census Bureau confirmed that "[a]pportionment is based on the resident population" as calculated pursuant to the Residence Rule. 83 Fed. Reg. at 5526 n.1. The APA's notice-and-comment requirements prohibit the Census Bureau from calculating the total population of each state in a manner different from that set forth in the Residence Rule without revising or replacing the Residence Rule pursuant to notice-and-comment rulemaking. Neither the President nor the Secretary of Commerce may order the Census Bureau to violate a rule issued pursuant to notice-and-comment rulemaking. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations, Inc.*, 556 U.S. 502.

220. Defendants' violations of the APA will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would

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otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

221. Defendants' violations of the APA also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

222. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

i. Declare that Defendants' exclusion of undocumented immigrants from (a) the tabulation of the total population of the states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states, is unauthorized by and violates the Constitution and laws of the United States;

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ii. Declare that Defendants' exclusion of undocumented immigrants is *ultra vires* and violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)-(b);

iii. Preliminarily and permanently enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

iv. Estop Defendants from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

v. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report the total population of each state under 13 U.S.C § 141(b) based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

vi. Issue a writ of mandamus compelling the President to calculate the whole number of persons in each state and the apportionment of the House of Representatives among the states based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

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vii. Issue a writ of mandamus compelling the President to calculate the apportionment of the House of Representatives among the states based on the method of equal proportions prescribed by Congress;

viii. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

ix. Award any other such additional relief as the Court deems proper.

Dated: July 24, 2020

Respectfully submitted,

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BC-DOC-0000001671

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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

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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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC. Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau, Defendants.	Civil Action No.

COMPLAINT

1. This action challenges President Trump's lawless attempt to exclude undocumented immigrants from the "persons" who must be counted in the Census for purposes of apportioning congressional seats to states. This xenophobic effort to deny the basic humanity of undocumented immigrants violates Article I's mandate to count all "persons" in the Census, and the Fourteenth Amendment's requirement that

"Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State . . . ." (emphasis added). These words leave no room for doubt: they expressly mandate counting "the whole number of persons" living in the United States for purposes of congressional apportionment. As the Supreme Court held just four years ago, "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including all non-citizens living in the United States, regardless of legal status. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016).

2. Despite this exceedingly clear constitutional command and binding Supreme Court precedent, on July 21, 2020, Defendant Trump issued a Presidential Memorandum addressed to Defendant Commerce Secretary Wilbur Ross titled, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). The Memorandum purports to declare—for the first time in our nation's history—that it is "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.)." In other words, the Memorandum directs Secretary Ross: do not count undocumented immigrants at all for purposes of congressional apportionment.[1]

[1] The Memorandum appears to potentially exclude both those with no form of status whatsoever as well as those currently authorized to remain and work in the U.S., such as holders of Deferred Action for Childhood Arrivals, who are nonetheless not "in lawful status under the Immigration and Nationality Act." See *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 487 (9th Cir. 2018) ("recipients of deferred action enjoy no formal immigration status") (quotations omitted), *rev'd in part, vacated in part sub nom Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412

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3. Rarely does any government actor, much less the President of the United States, so openly and obviously violate the Constitution. The Fourteenth Amendment mandates "counting the whole number of persons" for congressional apportionment. As the Supreme Court reaffirmed nearly four decades ago, an undocumented individual living in the United States "is surely 'a person' in any ordinary sense of that term," "[w]hatever his status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The President cannot change the fact that undocumented individuals are human beings.

4. The new "policy" also breaks an uninterrupted line of history: every Decennial Census in our nation's history has included every person who lives in the United States, regardless of citizenship or immigration status, for purposes of apportioning congressional representation. Defendant Trump's new policy set forth in the Memorandum therefore not only violates the plain and unequivocal text of Section 2 of the Fourteenth Amendment and related Supreme Court precedent, it also departs from hundreds of years of consistent Census practice.

5. In addition to contravening the plain text of the Constitution, Supreme Court precedent, and an unbroken line of historical practice, the policy conflicts with the Department of Justice's own longstanding position—asserted repeatedly over decades in litigation in courts around this country, including to this Court in 2018—that undocumented immigrants are "persons" who must be counted in the Decennial Census

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(E.D.N.Y. 2018) ("Deferred action does not . . . confer lawful immigration status"), *vacated and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). For the sake of consistency, Plaintiffs refer to all those excluded here as "undocumented."

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and apportionment calculations. The Administration's own lawyers have made clear that the policy is unconstitutional.

6. The new policy is a discriminatory attack on immigrants and immigrant communities, and particularly immigrant communities of color. It is intended to erase these individuals and communities, and to send the message that they do not count. Indeed, whereas the original Apportionment Clause in Article I, Section 2 infamously discounted enslaved Black Americans as three-fifths of a person for purposes of congressional apportionment, the Memorandum raises this numerical dehumanization to a new level: not three-fifths, but zero.

7. In practical terms, the policy will result in states such as California, Texas, and New York receiving fewer congressional districts and Electoral College votes, diluting the political power of the residents of these states. The policy will also deplete federal resources from states and localities with substantial immigrant populations. The policy is rank discrimination on the basis of national origin, race, and ethnicity in violation of the Equal Protection and Due Process guarantees of the Fifth Amendment.

8. The effects of the new policy will cascade beyond the exclusion of undocumented immigrants from the Census count. It is no coincidence that the Memorandum was unveiled shortly before the Census Bureau was scheduled to commence non-response follow up ("NRFU") field operations to identify persons who have not yet responded to the Census. The new policy of excluding undocumented immigrants from the Census conveys a xenophobic message aimed at suppressing Census participation from households containing immigrants and noncitizens. Unless enjoined, the policy undoubtedly will undermine the effectiveness of the Census Bureau's

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operations and deter members of immigrant communities—including undocumented immigrants, noncitizen immigrants with legal status, and United States citizens—from participating in the Census.

9. The new policy also violates a panoply of other constitutional and statutory prohibitions, including constitutional separation of powers, the Census Act, and the Administrative Procedure Act.

10. This is not Defendant Trump's first attempt to weaponize the Census to attack immigrant communities. Last year, the Supreme Court affirmed that the administration's effort to add a citizenship question to the 2020 Decennial Census would reduce Census responses among non-citizen households, and held that Defendant Ross's publicly-stated rationale—purportedly to help enforce the Voting Rights Act—was "contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66, 2575 (2019).

11. In issuing the Memorandum, Defendant Trump has now confessed the real reason behind that failed effort: to delete undocumented immigrants from the decennial enumeration altogether, and to exclude them categorically from the very concept of *personhood* in the Constitution. Among its many cynical motivations, the President's new policy is an obvious attempt to evade the consequences of the Supreme Court's decision and the permanent injunction issued by the district court in the citizenship question litigation. *See Dep't of Commerce*, 139 S. Ct. 2551; Order, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 634 (S.D.N.Y. July 16, 2019).

12. Plaintiffs therefore request declaratory, injunctive, and/or mandamus relief to prohibit Defendants from excluding undocumented immigrants from the population count used to apportion the House of Representatives.

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JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346(a), and 28 U.S.C. § 1361.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(e).

15. This Court has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

PARTIES

A. Plaintiffs

1. The New York Immigration Coalition

16. The New York Immigration Coalition ("NYIC") is an umbrella policy and advocacy organization for more than 200 groups in New York State, representing the collective interests of New York's diverse immigrant communities and organizations. It has its principal place of business at 131 West 33rd St, New York, NY 10001.

17. NYIC's mission is to unite immigrants, members, and allies so that all New Yorkers can thrive. It envisions a New York State that is stronger because all people are welcome, treated fairly, and given the chance to pursue their dreams. NYIC pursues solutions to advance the interests of New York's diverse immigrant communities and advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups. It seeks to build the power of immigrants and the organizations that serve them to ensure their sustainability, improve people's lives, and strengthen New York State.

18. NYIC's 200-plus members are dues-paying, 501(c)(3), nonprofit organizations that are committed to advancing work on immigrant justice, empowerment,

and integration. NYIC's members are located throughout New York State and beyond. These member groups include grassroots community groups, social services providers, large-scale labor and academic institutions, and organizations working in economic, social, and racial justice. A number of NYIC's member organizations receive funding from a variety of local, state, and federal government sources to carry out social service, health, and education programs. Many of these organizations receive governmental funding that is directly tied to the Decennial Census.

19. New York is likely to lose at least one House seat during the post-2020 Decennial Census apportionment process as a result of the exclusion of undocumented immigrants from the apportionment base. NYIC member organizations will lose political power because of New York's loss of at least one seat in the House of Representatives.

20. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure a number of NYIC's member organizations that receive funding to carry out social service, health, and education programs in these areas.

21. As an organization, NYIC has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, NYIC has and will continue to invest resources in Get Out the Count efforts through robust advocacy, outreach, and mass educational forums.

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22. The Census is ongoing, with the Census Bureau's NRFU just getting started.[2] NYIC plans to continue its Get Out the Count efforts during this NRFU. In its extensive Decennial Census outreach, NYIC will now face a much more difficult environment due to the perception among New York undocumented immigrants that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

23. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, NYIC will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to NYIC's Get Out the Count efforts will be diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, NYIC has already, and will continue to, divert resources from its other organizational priorities, including its work on health care

[2] U.S. Census Bureau, *2020 Census: Nonresponse Followup*, https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html (June 19, 2020).

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and language access issues, to address these concerns about decreased Census participation.

2. Make the Road New York

24. Plaintiff Make the Road New York ("Make the Road New York") is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains.

25. Make the Road New York's mission is to build the power of immigrant and working-class communities to achieve dignity and justice. To achieve this mission, they engage in four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation.

26. Make the Road New York has more than 22,000 members who reside in New York City, Long Island and Westchester County. These members lead multiple organizing committees across numerous issues and program areas of concern to the organization. Members take on leadership roles in the campaigns, determine priorities, and elect the representatives who comprise most of the Board of Directors.

27. The apportionment resulting from the exclusion of undocumented immigrants from the apportionment base will likely deprive New York of at least one seat in the House of Representatives, diminishing the political and voting power and influence, and thus injuring, Make the Road members who live in New York.

28. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

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29. Make the Road New York members include individuals who do not have lawful immigration status and as a result of the Memorandum will not be counted for apportionment of Congressional seats. Make the Road New York members also reside in states and localities where immigrant communities of color constitute significant portions of the population, including New York City and suburban areas outside of New York City. Its members in these jurisdictions rely on a number of government services whose funding is allocated based on population and demographics determined by the Decennial Census. This includes parents with children enrolled in Title I schools, and drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

30. Make the Road New York members will be deprived of funding to which they would be entitled by a more complete Census count.

31. One of the many Make the Road members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Perla Liberato. Ms. Liberato is a resident of Queens County, NY, where she works as a Youth Organizer. Because Ms. Liberato resides in New York State, she will lose political power because of her state's loss of representation in Congress.

32. Another Make the Road member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Yatziri Tovar. Ms. Tovar is a resident of Bronx County, NY, and works as a media specialist. Because Ms. Tovar resides in New York State, she will lose political power because of her state's loss of representation in Congress.

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33. Make the Road New York has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. For the 2020 Decennial Census, Make the Road New York is engaged in outreach and education work and receiving outside funding to help support this work. This work includes, among other things, general education programs, workshops for members, and person-to-person outreach. Make the Road New York's Census outreach efforts have already contacted over 100,000 people and assisted over 7,500 people with completing the Census questionnaire.

34. Make the Road New York will now face a much more difficult environment due to its constituents' heightened fear of interacting with government workers, which will be increased by anti-immigrant actions such as the decision to exclude undocumented immigrants from the apportionment base. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

35. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, Make the Road New York will be forced to expend more resources on their Decennial Census outreach efforts to reduce the effect of this policy change on the response rate in the immigrant communities of color it serves.

36. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision

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to exclude undocumented immigrants from the apportionment base, Make the Road New York will need to divert resources from other areas critical to its mission including civic engagement and providing legal services.

3. CASA

37. Plaintiff CASA is a nonprofit membership organization headquartered in Langley Park, Maryland. It has offices in Maryland, Virginia and Pennsylvania. CASA is the largest membership-based immigrants' rights organization in the mid-Atlantic region, with more than 90,000 members.

38. CASA's mission is to create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment, and legal services to immigrant communities. CASA serves nearly 20,000 people a year through its offices and provides support to additional clients over the phone and through email.

39. CASA as an organization receives governmental funding that is directly tied to the Decennial Census. Among other things, CASA receives Community Development Block Grant (CDBG) funds that are allocated based on population and demographics determined by the Decennial Census, including poverty levels. The exclusion of undocumented immigrants in the Census base count will very likely result in a lower percentage of CDBG funds allocated to the areas that CASA serves, and therefore CASA will receive fewer such funds.

40. CASA has an ongoing commitment to promote participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, CASA is participating in ongoing outreach and education work.

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41. CASA plans to continue its Get Out the Count efforts during the NRFU. But CASA's efforts will be undermined by the decision to exclude undocumented immigrants from the congressional apportionment because this will decrease participation among undocumented immigrants who will believe that they no longer need to complete the Census, and it will heighten fear of interacting with government workers among immigrant communities of color. This fear extends not only to undocumented immigrants but also to family members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

42. Because of the difficulties created by the decision to exclude undocumented immigrants from the Census count base, CASA will be forced to expend more resources on its Decennial Census outreach efforts to reduce the effect of this change in policy on the response rates in the immigrant communities of color it serves.

43. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the Census count base, CASA will need to divert resources from other areas critical to its mission, including job training and health outreach.

4. The American-Arab Anti-Discrimination Committee

44. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending and promoting the rights and liberties of Arab-Americans and other persons of Arab heritage. ADC is the largest American-Arab grassroots civil rights organization in the United States.

45. Founded in 1980 by former Senator James Abourezk, ADC's objectives include combating stereotypes and discrimination against and affecting the Arab-

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American community in the United States, serving as a public voice for the Arab-American community in the United States on domestic and foreign policy issues, and educating the American public in order to promote greater understanding of Arab history and culture. ADC advocates, educates, and organizes to defend and promote human rights and civil liberties of Arab-Americans and other persons of Arab heritage.

46. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California, New York, and Texas. Its members are also active through ADC's 28 local chapters and organizing committees, located in 20 states and the District of Columbia, including in Tucson and Phoenix, Arizona; Los Angeles and Orange County, California; Miami and Orlando, Florida; New York, New York; and Austin and Dallas, Texas.

47. ADC has members in states with significant populations of undocumented immigrants, such as Texas, New York, Florida, California, Arizona and Illinois. These states—particularly Arizona, California, New York, and Texas—are likely to lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. Many but not all of ADC's members in these states are U.S. citizens. The loss of political representation and political power will injure ADC's members in these states.

48. The exclusion of undocumented immigrants in the Census base count will reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian Americans, Arab Americans, and other immigrant communities of color constitute significant portions of the population. This will injure ADC members who

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reside in these areas, such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, Kings County, New York, and Prince George's County, Maryland. For example, ADC has members in these jurisdictions with children enrolled in Title I schools and members who use the roads on a regular basis and thus depend in part on federal highway funds for their upkeep.

49. As an organization, ADC is committed to promoting participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, ADC has undertaken engagement work within the Arab-American community. For example, ADC is conducting training for Census enumerators, running advertisements encouraging participation, and holding a strategy symposium, among other activities. ADC plans to continue its Get Out the Count work through the Non-Response Follow-Up time period.

50. ADC faces a difficult environment due to increased fear of interacting with government workers among the Arab-American community, a fear that will be heightened now because of the decision to exclude undocumented immigrants from the apportionment. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who fear that participating in the Decennial Census might endanger their loved ones.

51. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, ADC will be forced to invest more resources in its Decennial Census outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

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52. Because of the need to increase the time and money spent on Decennial Census outreach caused by the decision to exclude undocumented immigrants from the apportionment base, ADC will need to divert resources from other areas critical to its mission, including organizing, issue advocacy efforts, and educational initiatives.

5. The ADC Research Institute

53. Plaintiff ADC Research Institute ("ADCRI") is a 501(c)(3) corporation founded in 1982 by former Senator James Abourezk. ADCRI sponsors public programs and initiatives in support of the constitutional and First Amendment rights of Arab-Americans, as well as research studies, publications, seminars, and conferences that document discrimination faced by Arab-Americans in the workplace, schools, media and government agencies. These programs also promote a better understanding of Arab cultural heritage by the public and policy makers.

54. ADCRI is currently engaged in promoting Decennial Census participation among its constituents. ADCRI plans to continue this work through NRFU time period.

55. ADCRI is now facing a much more difficult environment due to increased fear in the Arab-American community of interacting with government workers, due in part to anti-immigrant actions such as the exclusion of undocumented immigrants from the apportionment base. Because of this heightened fear and suspicion, ADCRI will be forced to invest more resources in its outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

56. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the apportionment base, ADCRI will need to divert resources from other areas critical to its

mission, including its engagement with public school teachers and other educational issues

6. FIEL Houton Inc.

57. FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. FIEL is an immigrant-led organization who advocates for just laws for immigrant youth, their families, access to higher education for all people regardless of immigration status and access to justice for the community.

58. FIEL provides resources for undocumented students, understanding the path to college is unsteady for many first and even second-generation Americans. FIEL's office is open to anyone seeking guidance in their process of obtaining a higher education, including assistance with applying to college and applying for scholarships and other financial aid. FIEL also provides a variety of immigration services for our community—from providing legal counsel for immigrants to begin their pathway to citizenship to handling most immigration cases.

59. FIEL was born out of the need for civic engagement in support of undocumented students seeking a higher education and conducts organizing for the betterment of the communities they serve, including outreach and campaigns related to the 2020 Decennial Census directed at immigrant communities in Texas.

60. Today, FIEL has approximately 11,000 members in the greater Houston area who help lead FIEL's organizing. FIEL members reside in parts of Texas where immigrant communities of color constitute significant portions of the population, including Harris County.

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61. Texas would lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. The loss of political representation and political power will therefore injure FIEL's many members who live in Texas

62. FIEL members in Houston rely on a number of government services whose funding is allocated based on population and demographics determined by the decennial Census. This includes parents with children enrolled in Title I schools, drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs, and many other programs and facilities that receive Census-guided funding. FIEL members will be deprived of the benefits of census-guided funding to which they would be entitled by a more complete census count.

63. One of the many FIEL members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Deyanira Palacios. Ms. Palacios is a lawful permanent resident and a resident of Montgomery County, Texas. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives.

64. Another FIEL member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Karen Ramos. Ms. Ramos is a resident of Harris County, Texas, where she works as a realtor. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives. Ms. Ramos is entitled to remain and work lawfully in the United States through the Deferred Action for Childhood Arrivals ("DACA")

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Program. She is entitled to be counted in the ongoing 2020 Decennial Census along with all other residents of Texas, regardless of their immigration status.

65. The exclusion of undocumented immigrants from the census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, including Texas. This will injure FIEL and its members who benefit from census-guiding funding to carry out social service, health, and education programs in these areas.

66. As an organization, FIEL has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, FIEL has and will continue to invest resources in Get Out the Count efforts.

67. The Census is ongoing, with the Census Bureau's Non-Response Follow-Up just getting started. FIEL plans to continue its Get Out the Count efforts during this Non-Response Follow-Up. In its extensive Decennial Census outreach, FIEL will now face a more difficult environment due to the perception among undocumented immigrants in Texas that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

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68. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, FIEL will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to FIEL's Get Out the Count efforts will diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, FIEL has already, and will continue to, divert resources from its other organizational priorities, including its work on access to education for students, to address these concerns about decreased census participation within immigrant communities.

69. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision to exclude undocumented immigrants from the apportionment base, FIEL will need to divert resources from other areas critical to its mission such as other civic engagement activities.

B. Defendants

70. Defendant Donald J. Trump is the President of the United States. In that capacity, Defendant Trump issued a July 21, 2020 Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, described *infra*. As President, he has the statutory responsibility of transmitting to Congress "a statement showing *the whole number of persons* in each State, excluding Indians not taxed, as

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ascertained under the seventeenth and each subsequent decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a (emphasis added). He is sued in his official capacity.

71. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Decennial Census. 13 U.S.C. § 4.

72. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He oversees the Bureau of the Census ("Census Bureau") and is thus responsible for conducting the Decennial Census of the population. 13 U.S.C. § 141(a). He has statutory responsibility to "take a decennial census of the population," 13 U.S.C. § 141(a), and for reporting to the President by January 1, 2021, a "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). He is sued in his official capacity.

73. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency responsible for planning and administering the Decennial Census.

74. Defendant Steven Dillingham is the Director of the Census Bureau and thus has responsibility for administering a complete count of all persons residing in the United States, including for the purpose of providing that figure to the Secretary of Commerce for transmission to the President. He is sued in his official capacity.

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FACTS

A. Background on the Decennial Census

1. The Constitutional Command to Include All People in the Census for Purposes of Congressional Apportionment

75. The Constitution requires a Decennial Census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers" (the Apportionment Clause). U.S. Const. art. I, § 2, cl. 3. It also directs that "[t]he 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" (the Census Clause). *Id.*

76. Key here, Section 2 of the Fourteenth Amendment provides 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." *Id.* amend. XIV, § 2 (emphasis added).

77. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count *every single person* residing in the United States, whether citizen or noncitizen, *whether living here with legal status or without*," and "[t]he population count derived from that effort is used . . . to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019) (emphases added).

78. Consistent with this express constitutional mandate, the federal government has conducted a Census that includes all persons living in the United States, regardless of citizenship or legal status, every ten years since 1790.

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79. This was historically subject to only two qualifications, both contained in the explicit text of the Constitution: "Indians not taxed," and the Three-Fifths Clause for persons who were enslaved. The first exception has not been relevant for some time; the second, the Three-Fifths Clause, assumed that enslaved persons would be included in the Census, but provided that they would not be counted as full persons for the purposes of calculating population for congressional apportionment.

80. The explicit nature of these two qualifications, neither of which applies in modern times, reinforces that the Decennial Census and the resulting apportionment base must include every person physically living in the United States.

81. The Civil War and the abolition of slavery repudiated the Three-Fifths Clause, which the Fourteenth Amendment then repealed. During debates over the Reconstruction Amendments, Congress considered, and affirmatively rejected, proposals that would have altered Congressional apportionment to be based on the population of voters, rather than total population. Thaddeus Stevens introduced a constitutional amendment that would have apportioned House seats "according to their respective legal voters." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 10 (1866)). Congress rejected that proposal. *Id.*

82. As ratified, Section 2 of the Fourteenth Amendment carried forward the basic total population mandate of the Apportionment Clause, providing, as stated, 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."

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83. In introducing this final language on the Senate Floor, Senator Jacob Howard explained the provision as follows:

> [The] basis of representation is numbers . . . that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime . . . . The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.

Evenwel, 136 S. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766-2767 (1866)).

84. In *Evenwel v. Abbott*, the Supreme Court held that Section 2 of the Fourteenth Amendment "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128. The proposition that non-citizens must be included in the population base for apportioning the total number of U.S. House seats to each state was central to the Court's holding that the Fourteenth Amendment does not prohibit states from including non-citizens in drawing legislative districts within a state. The Court explained: "It 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. The concurring Justices agreed that "House seats are apportioned based on total population." *Id.* at 1148 (Alito, J., concurring in the judgment); *see also id.* at 1138 (Thomas, J., concurring in the judgment) ("[F]eatures of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants."). *See also Wesberry v. Sanders*, 376 U.S. 1,

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14 (1964) (noting that the "principle solemnly embodied in the Great Compromise" is "equal representation in the House for equal numbers of people").

85. Lower courts have similarly recognized that the Constitution requires that all people be included in the population totals used for Congressional apportionment, regardless of citizenship status. As a three-judge panel of the District Court for the District of Columbia explained:

> The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all- inclusive. . . We see little on which to base a conclusion that illegal aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980); *see also, e.g.*, *New York*, 351 F. Supp. 3d at 514.

2. *The Government's Repeated Acknowledgment of Its Constitutional Obligation to Include All People in the Census for Purposes of Congressional Apportionment*

86. The Justice Department has likewise not only conceded but forcefully argued that it has a constitutional obligation to count every person residing in the United States no matter their immigration status, and to use that data for apportionment purposes.

87. Facing a legal challenge in the early 1980s to the inclusion of undocumented immigrants in apportionment figures in *Federation for American Immigration Reform v. Klutznick*, the Government argued that the plaintiffs there sought "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."

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Defs.' Post-Arg. Memo. at 1, No. 79-3269 (D.D.C. Feb. 15, 1980). It explained that the "Constitution expressly requires the enumeration of the 'whole number of persons in each State' for purposes of apportionment of Representatives to the United States Congress and none of plaintiffs' legal theories puts in doubt that the plain meaning of this language must be given effect," and that the Census "has never . . . excluded from the apportionment base any inhabitant counted in the decennial census." Defs.' Reply Memo. & Opp'n to Pls.' Mot. for Summ. J. at 1, No. 79-3269 (D.D.C. Jan. 30, 1980).

88. The Government also rejected any policy rationale for overriding the constitutional mandate to include all persons in the enumeration for purposes of congressional apportionment, noting that the "constitutionally mandated requirement to count states' inhabitants for apportionment purposes is a matter separate from the need to solve the problems of illegal immigration." *Id.*

89. Similarly, in a September 22, 1989 letter, Carol Crawford, the Assistant Attorney General for Legislative Affairs, advised Senator Jeff Bingaman that the Justice Department had "found no basis" for reversing its existing position that the Census Clause and Section 2 of the Fourteenth Amendment "require that inhabitants of States who are illegal aliens be included in the census count."[3]

90. More recently, in *New York v. Department of Commerce*, the Government argued in its Motion to Dismiss that the "Constitution supplies a simple judicial standard for determining the constitutionality of [Census Bureau] practices—the Secretary must perform a person-by-person headcount, rather than an estimate of population." Memo. of

[3] Letter from Assistant Attorney Gen. Carol T. Crawford to Honorable Jeff Bingaman (Sept. 22, 1989), *in* 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989).

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Law in Support of Defs.' Mot. to Dismiss at 25, No. 1:18-cv-02921, ECF No. 155 (S.D.N.Y. May 25, 2018). Similarly, it contended that "where, as here, there is no allegation that the Secretary failed to establish procedures for counting every person, a case ceases to implicate 'actual Enumeration . . . .'" Reply Memo. of Law in Further Support of Defs.' Mot. to Dismiss at 7, No. 1:18-cv-02921, ECF No. 190 (S.D.N.Y. July 13, 2018).

91. The Government embraced the requirement that every person living in the United States must be included in the Census even more directly in its Post-Trial Proposed Findings of Fact in *New York v. Department of Commerce*, writing that the "Constitution requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Pls.' Claims at 1, No. 1:18-cv-02921, ECF No. 546 (S.D.N.Y. Nov. 21, 2018) (internal citations omitted).

92. Even more recently, in ongoing litigation in Alabama over the inclusion of undocumented immigrants in the Census, the Government argued that "[t]he very purpose of the census . . . is to count the number of people residing in each state." Memo. of Law in Support of Defs.' Mot. to Dismiss at 1, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772, ECF No. 45-1 (N.D. Ala. Nov. 13, 2019).

3. The Statutory Requirements to Include All People in the Census for Purposes of Congressional Apportionment

93. Article I, Section 2 of the Constitution provides that the Census may be conducted "in such manner as [Congress] shall direct by law." Congress has codified this

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command in a statutory scheme primarily contained in Title 13 of the United States Code, also known as the Census Act.

94. Congress delegated to the Secretary of Commerce responsibility for conducting the Census, providing that he "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date' . . . ." 13 U.S.C. § 141(a).

95. Congress has also created the Census Bureau within the Department of Commerce and authorized the Secretary of Commerce to delegate his duties under the Census Act to the Census Bureau. 13 U.S.C. §§ 2, 4.

96. The Secretary must report to the President a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" within nine months of the Census date. 13 U.S.C. § 141(b).

97. The President then performs a "ministerial" calculation of the number of U.S. House seats to which each state is entitled. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). The President is "require[d]" to use only "data from the decennial census" to perform this calculation, *id.* at 797, and the calculation must use a specific formula with "rigid specifications . . . provided by Congress itself, and to which there can be but one mathematical answer." *Id.* at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5).

98. The President must then transmit to Congress, "[o]n the first day, or within one week thereafter, of the first regular session . . . a statement showing *the whole number of persons* in each State . . . as ascertained under the . . . decennial census of the population," and "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives *by the method*

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known as the method of equal proportions." 2 U.S.C. § 2a (emphases added). The "method of equal proportions" is the specific formula prescribed by Congress that calculates the number of House seats for each state based on the total population of each state as enumerated in the Decennial Census.

99. Though the primary purpose of the Census enumeration remains the apportionment of Congressional seats (as well as, by extension, Presidential electors), the population count from the Decennial Census is also used by the states for decennial redistricting of state legislative districts; helps to determine the distribution of hundreds of billions of dollars of federal funding; and informs the decisions of federal, state, and local policymakers and private businesses.

4. The Census Bureau's Repeated Acknowledgments that All People Must Be Included in the 2020 Census for Purposes of Congressional Apportionment

100. After more than a decade of preparation, the 2020 Census is currently being conducted, with "Census Day" having occurred on April 1. Beginning in January in some places, and in March nationwide, Americans were asked to respond to the Census questionnaire online, by phone, or by mail. And while there have been some delays due to the COVID-19 pandemic, in-person NRFU is currently scheduled to take place between August 11 and October 31.[4]

101. Throughout the entire process of preparing for and conducting the 2020 Census, the Census Bureau has consistently represented that it would adhere to the

[4] *See* Census Bureau, *Overall Timeline*, https://2020census.gov/en/important-dates.html (last visited July 21, 2020).

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centuries-old practice of counting every person living in the United States—including undocumented immigrants—for apportionment and other purposes.

102. In fact, the Census Bureau has formally adopted a rule—pursuant to a notice-and-comment rulemaking process—that undocumented immigrants must be counted where they live and included in apportionment numbers. On February 8, 2018, the Census Bureau promulgated its "Residence Rule" for the 2020 Census, which lays out this requirement. 83 Fed. Reg. 5525 (Feb. 8, 2018) (formally titled "Final 2020 Census Residence Criteria and Residence Situations.").

103. The Residence Rule explains that the "residence criteria" are "used to determine where people are counted during each decennial census." *Id.* at 5526. The Residence Rule indicates that the criteria for determining residency set forth in the rule must then be used "to apportion the seats in the U.S. House of Representatives among the states" and that "[a]pportionment is based on the resident population, plus a count of overseas federal employees, for each of the 50 states." *Id.* at 5526 n.1.

104. The Residence Rule provides that "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The Census Bureau elaborated that the "Census Bureau is committed to counting every person in the 2020 Census," including citizens of foreign countries living in the United States. *Id.* at 5526. The Census Bureau considered a comment which "expressed concern about the impact of including undocumented people

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in the population counts for redistricting because these people cannot vote."[5] In response, the Census Bureau declined to make any changes to its residence criteria and indicated that it "will retain the proposed residence situation guidance for foreign citizens in the United States." *Id.* at 5530.

105. As of July 21, 2020, a copy of these criteria was available unchanged on the Census Bureau website, including the provision for foreign citizens:[6]

3. **FOREIGN CITIZENS IN THE UNITED STATES**
   a) ***Citizens of foreign countries living in the United States*** - Counted at the U.S. residence where they live and sleep most of the time.
   b) ***Citizens of foreign countries living in the United States who are members of the diplomatic community*** - Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.
   c) ***Citizens of foreign countries visiting the United States, such as on a vacation or business trip*** - Not counted in the census.

106. As of July 21, 2020, a webpage maintained by the Census Bureau addressing "Frequently Asked Questions on Congressional Apportionment" noted that resident population counts "include all people (citizens and non-citizens) who are living in the United States at the time of the census," and explicitly affirmed that undocumented residents must be included in the population totals used for Congressional apportionment:[7]

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[5] Final 2020 Census Residence Criteria and Residence Situations, Federal Register, Vol. 83, No. 27, Thursday, February 8, 2018, https://www.govinfo.gov/content/pkg/FR-2018-02-08/pdf/2018-02370.pdf (last visited July 21, 2020).

[6] Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States*, https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last visited July 21, 2020).

[7] Census Bureau, Frequently Asked Questions on Congressional Apportionment, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q6 (last visited July 21, 2020).

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Who is included in the apportionment population counts?

The apportionment population count for each of the 50 states includes the state's total resident population (citizens and non-citizens) plus a count of the overseas federal employees (and dependents) who have that state listed as their home state in their employers' administrative records.

For details on who is counted (and where they are counted) in the 2020 Census, see the 2020 Census Residence Criteria and Residence Situations.

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Who is included in the resident population counts?

The resident population counts include all people (citizens and non-citizens) who are living in the United States at the time of the census. People are counted at their usual residence, which is the place where they live and sleep most of the time.

The resident population also includes military and civilian employees of the U.S. government who are deployed outside the United States (while stationed or assigned in the United States) and can be allocated to a usual residence address in the United States based on administrative records from the Department of Defense.

Are undocumented residents included in the apportionment population counts?

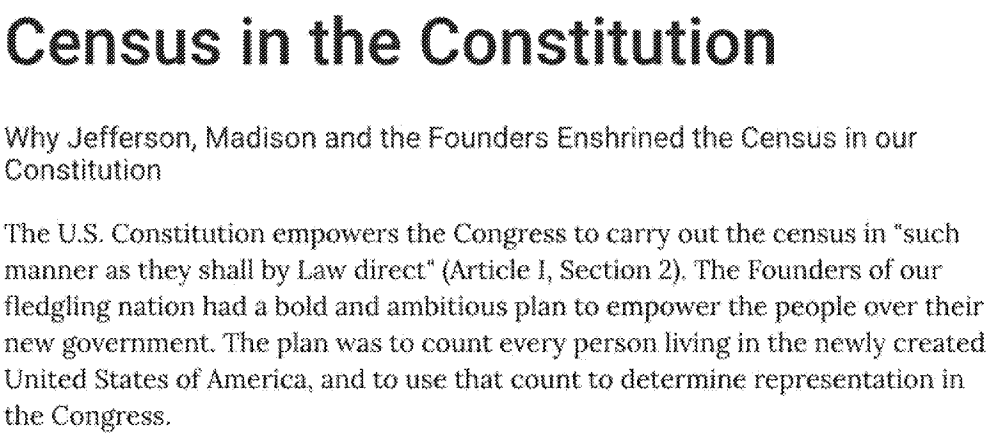
Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are included in the resident population for the census, which means they are all included in the apportionment counts.

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107. Likewise, as of July 21, the "Census in the Constitution" page on the Census Bureau website noted that "[t]he plan [of the Founders] was to count every person living in the United States of America, and to use that count to determine representation in Congress:"[8]

[8] Census Bureau, *Census in the Constitution*, https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html (last visited July 21, 2020).

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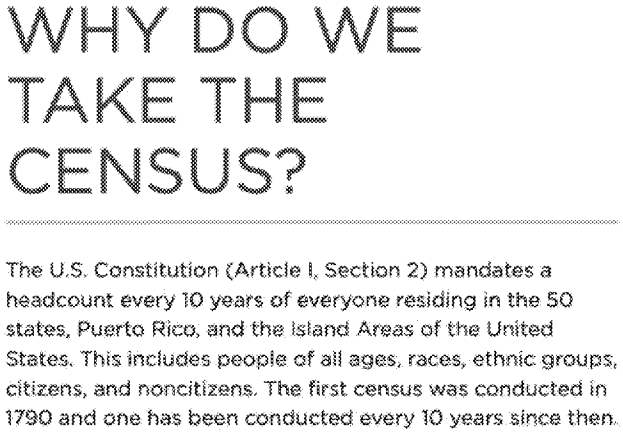


Census in the Constitution

Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution

The U.S. Constitution empowers the Congress to carry out the census in "such manner as they shall by Law direct" (Article I, Section 2). The Founders of our fledgling nation had a bold and ambitious plan to empower the people over their new government. The plan was to count every person living in the newly created United States of America, and to use that count to determine representation in the Congress.

108. Similarly, the Census Bureau's 2020 guide for Complete Count Committees, which are volunteer organizations designed to boost Census participation, advised that the Census "mandates a headcount every 10 years of everyone residing in the 50 states," including "citizens, and noncitizens:"[9]



WHY DO WE TAKE THE CENSUS?

The U.S. Constitution (Article I, Section 2) mandates a headcount every 10 years of everyone residing in the 50 states, Puerto Rico, and the Island Areas of the United States. This includes people of all ages, races, ethnic groups, citizens, and noncitizens. The first census was conducted in 1790 and one has been conducted every 10 years since then.

[9] Census Bureau, *2020 Census Complete Count Committee Guide* at 1 (2018), https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf (last visited July 21, 2020).

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109. Similarly, on its webpage "Setting the Record Straight," as of July 21, 2020, the Census Bureau assured readers that "[e]veryone counts" and that "everyone living" in the United States, including non-citizens, is counted in the 2020 Census:[10]

Setting the Record Straight

Does the 2020 Census ask about citizenship status?

NO. The 2020 Census does not ask whether you or anyone in your home is a U.S. citizen.

Are non-citizens counted in the census?

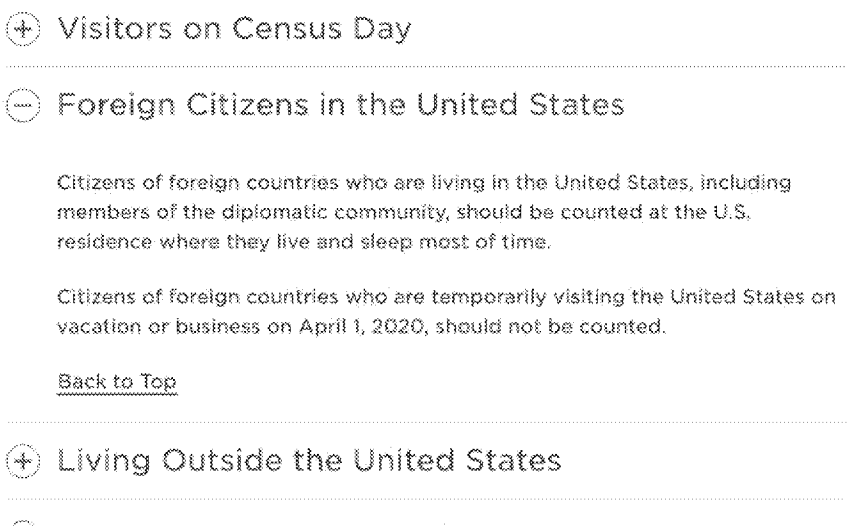
YES. Everyone counts. The 2020 Census counts everyone living in the country, including non-citizens. Learn more about who should be counted when you complete the 2020 Census.

110. As of July 21, the Bureau's "Who to Count" page repeated the same information:[11]

[10] Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html (last visited July 21, 2020).

[11] Census Bureau, *Who to Count*, https://2020census.gov/en/who-to-count.html (last visited July 21, 2020).

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111. And, as of July 21, the "Who Is Required to Respond" page on the Census Bureau's website for the 2020 Census also specified that "[e]veryone living in the United States . . . is required by law to be counted in the 2020 Census:"[12]



112. The 2020 Census is in process, but at this point remains far from enumerating the entire population. As of July 23, 2020, 62.3% of households in the United States have responded to the 2020 Census, according to the Census Bureau's estimates.[13] Included within this figure are likely significant numbers of undocumented immigrants who acted in good faith according to the Bureau's own instructions and

[12] Census Bureau, *Who Is Required to Respond*, https://2020census.gov/en/am-i-required.html (last visited July 21, 2020).

[13] Census Bureau, *Response Rates*, https://2020census.gov/en/response-rates.html (last visited July 21, 2020).

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responded to the census, with the understanding that they would be counted just like every other person living in the United States.

B. Defendants' First Attempt to Exclude Noncitizens from the Census: The Citizenship Question Litigation

113. This is not the first effort by Defendants to exclude noncitizens from the 2020 Census. Most notably, following the Secretary's March 2018 announcement that a citizenship question would be included on the Census, numerous plaintiffs, including Plaintiffs here, filed suit to block the question. After an eight-day bench trial, this Court issued a 277-page opinion and order including its findings of fact and conclusions of law. *See New York*, 351 F. Supp. 3d 502. The Court concluded that Plaintiffs had standing to sue because the inclusion of a citizenship question on the Census would deter participation in the Census by households with a noncitizen, leading to an undercount of such households, and that Defendants violated the Administrative Procedure Act in various ways, including by offering a "pretextual" rationale, *id.* at 516—Voting Rights Act ("VRA") enforcement—for the Secretary's decision. *Id.* at 516.

114. The Supreme Court affirmed, finding that the Secretary's VRA rationale was "incongruent with what the record reveal[ed] about the agency's priorities and decision-making process" and "contrived." *Dep't of Commerce*, 139 S. Ct. at 2575-76. The Secretary's March 2018 decision thus failed the basic requirement that agencies "pursue their goals reasonably," and was unlawful. *Id.* at 2576.

115. The Secretary's "contrived" pretext was pierced during discovery in a separate state court lawsuit, *Common Cause v. Lewis*, No. 18-CVS-14001 (N.C. Super. Ct.), where information that had been wrongfully concealed in discovery before this

Court revealed the true genesis of the decision to add a citizenship question to the 2020 Census. The evidence was discovered on the hard drive of Dr. Thomas Hofeller, a North Carolina-based longtime Republican strategist and redistricting expert who died in August 2018.[14]

116. In late August 2015, Hofeller was commissioned by the Washington Free Beacon, a conservative website, to study the "practicality" and "political and demographic effects" of using citizen voting age population ("CVAP") instead of total population ("TPOP") to achieve equal population in redistricting.[15] Hofeller advised that if a citizenship question were added to the 2020 Decennial Census so as to enable the exclusion of non-citizens from the population base in redistricting, the results "would be advantageous to Republicans and Non-Hispanic Whites."[16]

117. Documents also revealed that Hofeller in 2015 communicated directly with Census Bureau official Christa Jones, using her private email address, and that Jones notified Hofeller of the Federal Register's notice for comment regarding the Census Bureau's Content Test for that year, suggesting that there was "an opportunity to mention citizenship."[17] Hofeller subsequently helped ghostwrite a draft DOJ letter to Commerce

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[14] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Apr. 21, 2018) https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

[15] Pls.' Mot. for Order to Show Cause Ex. C at 1-2, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[16] Pls.' Mot. for Order to Show Cause Ex. D at 9, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[17] Tara Bahrampour, *GOP strategist and census official discussed citizenship question, new documents filed by lawyers suggest*, Wash. Post (June 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-

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requesting a citizenship question that subsequently came into the possession of his "good friend[]" Mark Neuman, Defendant Secretary Ross's "trusted" and "expert adviser" on census issues, who "act[ed] analogously to an agency employee."[18] Following a call between then-North Carolina Congressman (and now Defendant Trump's Chief of Staff) Mark Meadows and Defendant Secretary Ross, senior aides of Secretary Ross facilitated a meeting at which Neuman provided Hofeller's draft to John Gore, the Acting Assistant Attorney General for Civil Rights, who ultimately "requested" that the Bureau include a citizenship question on the census.[19] Meanwhile, Jones eventually came to serve as Chief of Staff to the Acting Director of the Census Bureau at the time of Defendant Secretary Ross's March 2018 Decision Memorandum ordering the inclusion of a citizenship question on the census. Jones later testified that Hofeller favored adding a citizenship question to the census to aid "the Republican redistricting effort" and that Hofeller's business partner, Dale Oldham, advocated for a citizenship question for redistricting and apportionment purposes "more times than I can remember."[20]

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connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/.

[18] NYIC Pls.' Mot for Sanctions, 1:18-cv-2921 (JMF), ECF No. 635-1 at 124-136; Def's Opp. to Ltr. Mot. to Compel, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 451 at 3 (S.D.N.Y. Oct. 30, 2018).

[19] Pls.' Joint Proposed Post-Trial Findings of Fact, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 545 at 52-53 ¶¶ 364-69 (S.D.N.Y. Nov. 21, 2018) (citing trial exhibits).

[20] Memorandum from Acting Chairwoman Carolyn B. Maloney to Members of the United States House Committee on Oversight, *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress*, 12 (Nov. 12, 2019) https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf.

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118. Subsequent statements by Defendant Trump and other Administration officials and advisors confirmed that a discriminatory intent to exclude noncitizens—and particularly, undocumented immigrants—from redistricting was the actual purpose of the effort to add a citizenship question to the Census.

119. For example, on July 1, 2020, Defendant Trump stated that a citizenship question was "very important to find out if someone is a citizen as opposed to an illegal," and that "Democrats want to treat the illegals, with healthcare and other things, better than they treat the citizens of this country."[21]

120. Defendant Trump himself has repeatedly admitted that his administration sought to add the citizenship question to harm immigrant communities by excluding them from the decennial enumeration and thus from redistricting and apportionment. About a week after the Supreme Court's holding in *Department of Commerce*, Defendant Trump, asked why he was still trying to get a citizenship question on the census, said: "Number one, you need it for Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going? How many people are there?"[22]

121. Days later, at a press conference in the White House Rose Garden, Defendant Trump similarly stated that the citizenship information his administration sought is "relevant to administering our elections. Some states may want to draw state

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[21] *Remarks by President Trump at Signing of H.R. 3401*, White House (July 1, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/.

[22] Remarks by President Trump Before Marine One Departure, White House (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/).

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and local legislative districts based upon the voter-eligible population."[23] In particular, Defendant Trump urged states to apportion and redistrict on the basis of citizen voting age population instead of total population, as Hofeller had advised, because he suggested that the move might be immune from judicial scrutiny: "Indeed, the same day the Supreme Court handed down the census decision, it also said it would not review certain types of districting decisions, which could encourage states to make such decisions based on voter eligibility."[24]

122. At the same press conference, Defendant Trump stated: "As shocking as it may be, far-left Democrats in our country are determined to conceal the number of illegal aliens in our midst. They probably know the number is far greater, much higher than anyone would have believed before. Maybe that's why they fight so hard. This is part of a broader left-wing effort to erode the rights of the American citizen."[25]

123. Several of Defendant Trump's associates and agents also stated—in the wake of the Supreme Court's ruling in *Department of Commerce*—that excluding noncitizens from the census is necessary either to curtail immigration or limit the political power of immigrant communities of color.

124. Matt Schlapp, Chairman of the American Conservative Union and husband to Mercedes Schlapp, Defendant Trump's Director of Strategic Communications, tweeted on June 27, 2019 that he wanted to "impeach[] the Chief

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[23] *Remarks by President Trump on Citizenship and the Census*, White House (July 11, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[24] *Id.*

[25] *Id.*

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Justice [Roberts]" for "angling for vast numbers of illegal residents to help Dems hold Congress."[26]

125. Former Vice Chair of the President's Commission on Electoral Integrity and anti-immigrant zealot Kris Kobach stated on July 8, 2019 that he "advised the President on putting the citizenship question back on the U.S. Census," adding that he wanted to "make it a requirement in federal law that we must ask the question in every census going forward."[27] A supplement to the Administrative Record in the citizenship question litigation revealed that Secretary Ross (at the behest of former White House senior advisor Steve Bannon) had discussed adding a citizenship question with Kobach, who advised that the question's absence on the census "leads to the problem that aliens … are still counted for congressional apportionment purposes." In separate public statements, Kobach reiterated that the purpose of adding a citizenship question to the census was "so Congress [can] consider excluding illegal aliens from the apportionment process,"[28] because "citizens in a district with lots of illegal aliens have more voting power than citizens in districts with few illegal aliens."[29]

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[26] Matt Schlapp (@mschlapp),, Twitter (June 27, 2019, 8:29 AM), https://twitter.com/mschlapp/status/1144266564935528449.

[27] Pilar Pedraza (@PilarPedrazaTV), Twitter (July 8, 2019), https://twitter.com/PilarPedrazaTV/status/1148296658943381508.

[28] Kris Kobach, *Exclusive—Kobach: Bring the Citizenship Question Back to the Census*, Breitbart (Jan. 30, 2018), http://www.breitbart.com/big-government/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/.

[29] Kris Kobach, *Why the Citizenship Question is So Important*, Breitbart (June 27, 2019), https://www.breitbart.com/politics/2019/06/27/kobach-why-the-citizenship-question-is-so-important/.

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126. Defendant Trump has also repeatedly denigrated and dehumanized non-white immigrants. He has stated that certain immigrants "aren't people, these are animals,"[30] and his administration has housed immigrant children in cages and separated them from their families.[31] Indeed, Defendant Trump has long complained about the growth of immigrant communities of color, tweeting in 2015: "How crazy - 7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[32]

127. Secretary Ross has publicly supported the Trump Administration's anti-immigrant agenda, applauding Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse, and chain immigration."[33]

128. This slew of public statements and actions—from Defendant Trump and some of his highest-level advisers and administration officials—shows clearly that the true rationale for a adding a citizenship question is driven by racial animus against immigrants of color and a desire to curb the political power of immigrant communities of color.

C. The Presidential Memorandum to Exclude Undocumented Immigrants from the Census

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[30] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[31] BBC, *Trump migrant separation policy: Children 'in cages' in Texas*, June 18, 2018, BBC News, https://www.bbc.com/news/world-us-canada-44518942.

[32] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[33] Press Release, Commerce Dep't, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps.

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129. Where subterfuge has failed, Defendants have now turned to executive fiat. Barred from including a citizenship question on the 2020 Census, Defendants have now contrived a new scheme to identify and directly exclude undocumented immigrants from the Actual Enumeration required for apportionment. On July 21, 2020, Defendant Trump issued a presidential memorandum to the Secretary of Commerce entitled, "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census."[34]

130. The Memorandum wrongly asserts that "[t]he Constitution does not specifically define which persons must be included in the apportionment base," that "persons in each state" has been interpreted to mean "inhabitants," that the scope of the term "inhabitants" requires "the exercise of judgment," and that the President purportedly has discretion to exercise that judgment to exclude entire categories of persons who reside in the United States. *Id.*

131. On this asserted legal basis, the Memorandum declares that for reapportionment following the 2020 Census, "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* § 2.

132. The Memorandum states that the Secretary, in submitting his Census report under 13 U.S.C. § 141(b), "shall take all appropriate action, consistent with the

[34] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/.

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Constitution and other applicable law" to provide information to the President to allow for the exclusion of undocumented immigrants. *Id.* § 3.

133. By its explicit and emphatic declaration of federal policy, the Memorandum directs the Commerce Department (and through the Commerce Department, the Census Bureau) to take steps to allow the President to exclude undocumented immigrants in his apportionment report to Congress issued under 2 U.S.C. § 2(a). *Id.* This includes, but is not limited to, "provid[ing] information" in the report that the Secretary must provide to the President under 13 U.S.C. § 141(b) that will "permit[] the President" to exclude undocumented immigrants in calculating the number of U.S. House seats to which each state is entitle. *Id.*

134. The Memorandum asserts that excluding undocumented immigrants is justified because "the principles of representative democracy" are undermined by tying the political influence of states to a population that includes undocumented immigrants. Memorandum, § 2.

135. In an accompanying statement, Defendant Trump declared that the Memorandum followed through on his commitment to determine the citizenship status of the population, and argued that "the radical left is trying to erase the existence of [the concept of American citizenship] and conceal the number of illegal aliens in our country" as "part of a broader left-wing effort to erode the rights of Americans [sic] citizens."[35] The statement repeated the Memorandum's argument that counting undocumented

[35] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

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immigrants creates "perverse incentives," and that "we should not give political power to people who should not be here at all."[36]

136. Upon information and belief, following receipt of the Memorandum, the Department of Commerce has issued directives to the Census Bureau, constituting final agency action, to implement the policy of excluding noncitizens from the enumeration used for congressional apportionment, as set forth in the Memorandum.

137. On June 23, 2020, Defendant Trump's re-election campaign sent an email making plain that the intent of the Memorandum is to undermine the Census and demonize immigrants. The email characterized the Memorandum as an "Executive Order" that "will block" undocumented people from "receiving congressional representation" and from "being counted in the U.S. Census."[37] The email claimed that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens."[38]

D. The Effect of Excluding Undocumented Immigrants from the Census

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[36] *Id.*

[37] Hansi Lo Wang (@hansilowang), TWITTER (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672.

[38] *Id.* *See also* Tara Bahrampour, *Trump's reelection campaign calls for adding citizenship question to 2020 census amid criticism that he is politicizing the count*, Wash. Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html (describing a "Trump reelection campaign" email that asked supporters whether they "support[ed] the president in adding a citizenship question" to the Census and noting that critics described the email as "demoralizing," "an assault on the constitution," and "a sly attempt to rally the president's base").

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138. Pew Research Center has estimated that the total population of undocumented immigrants in the United States was 10.5 million people in 2017.[39] The Department of Homeland Security (DHS) has estimated that the total population of undocumented immigrants in the United States was 12 million in 2015.[40]

139. California, Texas, and New York are consistently three of the states with the largest populations of undocumented residents.

140. According to Pew Research Center, California had 2 million undocumented residents, Texas had 1.6 million undocumented residents, and New York had 650,000 undocumented residents in 2017, subject to an upward or downward variance of 50,000 people for each estimate.[41]

141. According to DHS, California had 2.9 million undocumented residents, Texas had 1.9 million undocumented residents, and New York had 590,000 undocumented residents in 2015.[42]

142. The current average population of each U.S. House district is 710,767 people.

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[39] Jeffrey S. Passel and D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Ctr. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.

[40] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[41] Passel and Cohn, *supra* note 38.

[42] Office of Immigration Statistics, *supra* note 46.

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143. The Memorandum expressly aims to alter Congressional apportionment based on states' undocumented populations. For example, it argues that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." Memorandum§ 2.

144. Of these states, the Memorandum specifically targets California, anticipating that excluding undocumented immigrants from the census would deprive California of multiple House seats (an thus, Electoral College votes). The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* Upon information and belief, this "one State" is California.

145. Unlawfully excluding undocumented residents from the population count used for apportionment will likely deprive several states—most particularly, Arizona, California, New York, and Texas—of at least one House seat (or will cause not to gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process.

146. Indeed, this Court found that Arizona, California, Florida, Illinois, New York, and Texas all faced a substantial certainty of losing a seat based on a differential undercount of 5.8% of all noncitizens in the 2020 census. *New York*, 351 F. Supp. 3d at 594, *aff'd in relevant part*, 139 S. Ct. 2551. The evidence upon which the Court based these findings—the testimony of Dr. Chris Warshaw—relied on smaller undercounts of

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noncitizens in each of these states than would be caused by the Memorandum. *See id.* (citing Warshaw Decl., Dkt. No. 526-1). A greater impact will occur for these states if ***100%*** of undocumented immigrants are removed from the apportionment count. Other studies have also confirmed the certainty that various states would lose a seat if undocumented residents are removed.[43]

147. But the effects of the Memorandum are likely to run even deeper. Like the failed effort to add a citizenship question to the census, the new policy of excluding undocumented immigrants from the census will broadcast a xenophobic message to immigrant communities about census participation, suppressing responses from households containing immigrants and noncitizens. This will result in the omission from the census not only of undocumented immigrants, but also noncitizen immigrants with legal status and United States citizens. The resulting undercount will harm the work of organizations—including that of the Plaintiffs here—in promoting census participation and will further strip representation and economic resources from communities with immigrant populations.

E. The Census Bureau's Likely Use of Statistical Modeling to Estimate the Undocumented Population

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[43] *See* Amelia Thomson-DeVeaux, *The Citizenship Question Could Cost California And Texas A Seat In Congress*, FiveThirtyEight (June 17, 2019), https://fivethirtyeight.com/features/the-citizenship-question-could-cost-california-and-texas-a-seat-in-congress/ (finding California, Arizona, and Texas would lose at least one seat in a poorly conducted census and 10% of households with undocumented immigrants undercounted). While there are questions about the accuracy of its expert's methodology, the State of Alabama has asserted essentially the same thing in separate litigation. *See* Expert Report of Dudley Poston at 28, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-00772-RD (N.D. Ala.) (opining that excluding undocumented residents from apportionment base would cause California, Texas, and New Jersey to lose seats).

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148. The Census Bureau does not have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction.

149. After completion of the citizenship question litigation, the Census Bureau indicated that it would seek to compile citizenship status information for Census respondents by using administrative records, including records from the Social Security Administration. Such administrative records, however, do not provide information as to *legal status*, as opposed to citizenship, and cannot be used to determine whether census respondents are *undocumented immigrants* specifically.

150. In fact, the Government has recently represented in separate litigation, via a declaration by Census Bureau Senior Advisor Enrique Lamas, that it "lack[s] . . . accurate estimates of the resident undocumented population" on a state-by-state basis.[44]

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[44] Defendants' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *State of Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020). *See also* Jeffrey Mervis, *Why the U.S. Census Bureau could have trouble complying with Trump's order to count citizens*, Science Mag. (Sept. 16, 2019), https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-trouble-complying-trump-s-order-count-citizens (detailing the "formidable challenge" in relying on administrative records); Comment from Campaign Legal Center, OMB Control Number 0607-0995, https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf (noting that "[s]tate administrative data on individual citizenship status are notoriously riddled with errors and outdated information" and "records misidentify naturalized U.S. citizens as non-U.S. citizens"); Jennifer Van Hook, *Counting 11 million undocumented immigrants is easier than Trump thinks*, The Conversation (July 17, 2019), https://theconversation.com/counting-11-million-undocumented-immigrants-is-easier-than-trump-thinks-120459 (observing that administrative records provide "inconsistent information about the same person," have "limited value for describing those who fall outside of the administrative records system," and will require researchers to "make assumptions about coverage error").

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151. In the absence of means to actually enumerate the total population of the United States minus undocumented immigrants, the Government has indicated its intention to use statistical modeling to estimate the undocumented population and thereby calculate an apportionment population that excludes undocumented immigrants. In separate litigation, Department of Justice attorney Stephen Ehrlich recently stated in a hearing that "there may need to be some statistical modeling" in order to carry out the Memorandum, though the Government had not yet "formulated a methodology."[45]

152. This statement is consistent with the previous efforts of governmental and non-governmental actors that have endeavored to project the population of undocumented immigrants in the United States. For example, Pew Research Center compiles statistical estimates of the population of undocumented immigrants rather than an actual enumeration, making a variety of statistical adjustments to the census population numbers and weighting the data.[46] DHS has similarly used statistical sampling methodology, the residual method, for estimated the populations of undocumented immigrants. [47]

153. The scope of any statistical model required to estimate the number of undocumented immigrants would be unprecedented for use in calculating the

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[45] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985

[46] *See*, J. Passel, *Measuring illegal immigration: How Pew Research Center counts unauthorized immigrants in the US* (July 12, 2019), https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/.

[47] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. DHS has not performed any estimates of the population of undocumented immigrants for any year since 2015.

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apportionment population. Such statistical processes are not an "actual Enumeration" as required under Article I of the Constitution. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 (1999); *id.* at 346 (Scalia, J., concurring) ("It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling.").

CAUSES OF ACTION

COUNT ONE
Violation of Enumeration and Apportionment (Article I, Section 2, Clause 3 of the Constitution, and Section 2 of the Fourteenth Amendment) (All Plaintiffs against All Defendants)

154. Plaintiffs repeat and re-allege by reference all of the previous allegations in this Complaint.

155. The Constitution requires that the apportionment of seats for the House of Representatives be conducted on the basis of the total population of all persons in each state, following each Decennial Census.

156. In particular, Article I, Section 2 of the Constitution requires 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," "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

157. Section 2 of the Fourteenth Amendment provides that "Representatives shall 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 (emphasis added).

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158. "Whatever his status under the immigration laws, an alien is . . . a 'person'" for purposes of the Fourteenth Amendment. *Plyler*, 457 U.S. at 210. A "person" means a "human being," *Black's Law Dictionary* (11th ed. 2019), and no matter what the Trump Administration may say, undocumented immigrants are human beings. Undocumented immigrants living in the United States are among the "whole number of persons in each State," U.S. Const. amend. XIV, § 2, and thus the plain and unequivocal text requires counting undocumented immigrants in the total population base used for Congressional apportionment.

159. The Supreme Court has definitively held that non-citizens must be included in the population base used to apportion U.S. House seats to each state. The Court held just four years ago that "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including non-citizens. *Evenwel*, 136 S. Ct. at 1129; *see also id.* at 1128 ("The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.").

160. Other courts, including this Court, have recognized the same. *See, e.g.*, *New York*, 351 F. Supp. 3d at 514 ("[T]he Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and "[t]he. population count derived from that effort is used . . . to apportion Representatives among the states"); *Klutznick*, 486 F. Supp. at 576 ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for

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apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'").

161. The Memorandum brazenly ignores this precedent and the plain text of the Constitution. It purports to unilaterally declare that undocumented immigrants are not "persons" under the Fourteenth Amendment. Based on that shocking and baseless assertion, the Memorandum declares it to be the explicit policy of the United States "to exclude from the apportionment base aliens who are not in a lawful immigration status." The Memorandum further directs the Secretary to provide the President with information in his Census report that excludes undocumented immigrants from the population count of each state, so as to permit the President to exclude such persons in reporting to Congress the number of each representatives to which each State is entitled, which the President will then do.

162. By denying undocumented immigrants are "persons" and excluding them from the total population count for congressional apportionment, the Memorandum violates the plain and straightforward command of the Enumeration Clause and the Fourteenth Amendment, as well as binding Supreme Court precedent.

163. The Memorandum further violates the Enumeration Clause and the Fourteenth Amendment by apportioning U.S. House seats among the states based on data other than the "numbers" reflecting the total population of each state as determined by the "actual Enumeration" of the Decennial Census.

164. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to each receive at least one fewer seat in

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the House of Representatives. Because these states will have at least one fewer congressional district than they would otherwise, each congressional district in these states will encompass more total people than it would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

165. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute substantial portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

166. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. at 2565–66; *Utah v. Evans*, 536 U.S. 452, 464 (2002); *U.S. House of Representatives*, 525 U.S. at 329–34.

COUNT TWO
Violation of Census Act
(2 U.S.C. § 2a(a); 13 U.S.C. § 141)
(*Ultra Vires*)

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167. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

168. Congress has required that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" 13 U.S.C. § 141(a). "The tabulation of total population by States under subsection (a) of [§ 141] *as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b) (emphasis added).

169. In turn, "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and 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." 2 U.S.C. § 2a(a).

170. As the Supreme Court and the Census Bureau have recognized, these statutes require that persons whose "usual residence" is in the United States must be counted in the enumeration and apportionment of U.S. House seats at that "usual residence." "[T]he first census conducted in 1790 required that persons be allocated to their place of 'usual residence,'" and "'usual residence' has continued to hold broad connotations" through present day. *Franklin*, 505 U.S. at 803, 805. The Census Bureau has confirmed that its official policy today is that "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of

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'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time." Residence Rule, 83 Fed. Reg. at 5526.

171. Under the Census Bureau's Residence Rule, "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533.

172. The President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary of Commerce to tabulate and transmit reports to the President estimates of the total population in each State that are based on data other than the actual Enumeration of each state as determined by the decennial census, and that do not count all persons who live in the state as their "usual residence." Specifically, the President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary to rely on administrative data other than the actual Enumeration of each state as determined by the decennial census, and to exclude undocumented immigrants who reside in a state as their usual residence, in tabulating the total population of each state and transmitting those total population numbers to the President.

173. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by requiring the President to calculate and transmit to Congress total population figures for each state, and the apportionment of U.S. House seats among the states, based on data other than "decennial census of the population," and by using a method other than the "method of equal proportions" prescribed by Congress. 2 U.S.C. § 2a(a). The President may use only the actual enumeration of the total population of each State as "ascertained under the . . . decennial census"—and nothing else—to calculate the whole number of persons in each State and the number of Representatives for each state.

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2 U.S.C. § 2a(a). Likewise, the "method of equal proportions" is a "rigid" formula "provided by Congress itself" that requires use of the total population of each State as determined based on the decennial census and no other administrative data. *Franklin*, 505 U.S. at 2775.

174. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by causing the President to transmit to Congress total population figures for each state that do not include all persons who live in each state as their "usual residence," and/or by causing the President to transmit to Congress a number of Representatives for each state that is calculated by excluding persons who live in each state as their "usual residence." If the Secretary of Commerce transmits one set of total population numbers to the President that *do* include undocumented immigrants who live in the United States as their usual residence (as the Secretary must do), then the President is required to use *that* set of total population numbers in transmitting to Congress "the whole number of persons in each State," and "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." 2 U.S.C. § 2a(a). The number of whole of persons in each state that the President must transmit to Congress must be that "ascertained under the . . . decennial census of the population," *id.*, which includes all persons living in the United States as their usual residence, 13 U.S.C. § 141(a)–(b). And it is "required for the apportionment of Representatives in Congress among the several States" that the President and the Secretary use the total population numbers tabulated for each state that include all persons who live in each state as their usual residence. 13 U.S.C. § 141(b).

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175. Because Defendant Trump and Secretary Ross will act beyond the scope of their statutory authority in a way that causes constitutional violations, they are acting *ultra vires* pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141. *See, e.g.*, *Mountain States Legal Foundation v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) ("[T]he Supreme Court has indicated generally that review is available to ensure that Proclamations are consistent with constitutional principles and the President has not exceeded his statutory authority."); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority. . . . That the executive's action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

176. The Memorandum also will result in the President and Secretary Ross failing to perform their clear legal duties to, among other things: tabulate the total populations of the States based on data from the decennial census that includes all persons who live in the United States as their usual residence; calculate the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence; and transmit to Congress the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence.

177. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives.

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Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

178. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

179. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT THREE
Discrimination on the Basis of Race and National Origin
(Fifth and Fourteenth Amendments of the U.S. Constitution)
(All Plaintiffs against All Defendants)

180. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

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181. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the federal government not deny people the equal protection of its laws and prohibits the federal government from discriminating against individuals in the United States on the basis of race, ethnicity, national origin, and citizenship. U.S. Const. amend V.

182. The Supreme Court has affirmed the clear text of the Fifth Amendment by recognizing its constitutional protections apply to "person[s]" within the jurisdiction of the United States, and not only to citizens. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (Field, J., concurring) ("[t]he term 'person,' used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic"); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

183. The Fifth Amendment's Due Process Clause "applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

184. The "bedrock protections of the Fifth Amendment's Due Process Clause" are not eliminated by the "mere act of entry into the United States without documentation." *Garza v. Hargan*, 874 F.3d 735, 737–38 (D.C. Cir. 2017) (Millett, J., concurring).

185. The Fifth Amendment's prohibition on discrimination on the basis of race, ethnicity, national origin, and citizenship is co-extensive with the Equal Protection guarantees of the Fourteenth Amendment, which the Supreme Court has long recognized extends to undocumented immigrants. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [and is] universal in [its] application, to

all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In more recent years, the Supreme Court has reaffirmed that "aliens whose presence in this country is unlawful . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210.

186. The Memorandum violates the Fifth Amendment's prohibition on discrimination in at least two distinct respects. First, it facially targets undocumented immigrants for exclusion from the decennial enumeration, outright denying them the status of "persons" under the Constitution. Government action denying the *personhood* of people living in the United States echoes the darkest chapters of American constitutional history. *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

187. Second, as with the failed scheme to include a citizenship question on the census, this latest discriminatory act is motivated by a bare desire to harm immigrant communities of color, and particularly Latinx communities, by reducing their political clout and access to federal resources.

188. Defendant Trump and nativist members of his Administration view non-white, undocumented immigrants as a political and cultural threat. The President, as noted *supra*, has directed particularly virulent animus at Latinx immigrants. Defendant Trump and members of his Administration have long warned about the consequences of rising Latinx political power in the United States and the ostensible harms of undocumented immigrants to the United States.

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189. The Memorandum not only would codify the animus and discriminatory goals of Defendants, but it would result in a cascade of discriminatory effects, including, but not limited to:

a. The loss of congressional seats and Electoral College votes in states where these groups constitute significant portions of the population and where Plaintiffs have members, including a certainly impending loss for California; a substantial risk of a loss for New York, Texas, Florida, Arizona, and Illinois; and a considerable risk of a loss for New Jersey and Georgia; and

b. A substantial reduction in the amount of federal funds distributed to the local and state governments in which the Plaintiffs reside, which all have significant, non-white populations; and

c. A reduction of the political influence to which these communities would receive through an accurate census count.

190. In addition to the discriminatory effects evidence well-known and acted upon by Defendants and the direct intent evidence outlined, the haphazard process through which the Defendants promulgated this Memorandum provides strong circumstantial evidence of discriminatory intent. This evidence includes the timing of the release of the Memorandum, which coincides with dispatching of Census field operations to conduct outreach to groups the Defendant Trump has discouraged from participating with dark and racist presidential campaign statements; the bizarre procedural sequence and series of events leading up to the Memorandum; the President's repeated efforts to generate confusion surrounding and distrust of the Census process; the shallow justifications cited by the President for the memorandum; the historical background and

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substantive departures from prior precedents; contemporary statements of the President and other decisionmakers; and the profound unworkability of the Memorandum.

191. Defendants' violations of the Fifth Amendment will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

192. Defendants' violations of the Fifth Amendment also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

193. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

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COUNT FOUR
Separation of Powers
(Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment)
(All Plaintiffs against Defendant Trump)

194. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

195. Article I of the U.S. Constitution, in conjunction with the Fourteenth Amendment, requires that the federal government conduct an "actual Enumeration" of the national population every ten years to determine the "whole number of persons" in the United States and within each state for the purpose of apportioning members of the House of Representatives to the respective states according to their population. U.S. Const. art I, § 2, cl. 3; *id.* amend. XIV, § 2.

196. The Constitution, through the Enumeration Clause, "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Dep't of Commerce*, 139 S. Ct. at 2566 (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)).

197. As the Supreme Court has noted repeatedly, through the Census Act, Congress "delegated to the *Secretary of Commerce* the tasks of conducting the decennial census 'in such form and content as he may determine,'"—not the President. *Id.* at 2567 (quoting 13 U.S.C. § 141(a)).

198. The text of the Census Act itself makes clear that Congress has delegated authority over the census to the *Commerce Secretary*, not the *President*.

199. Section 141(a) of the Census Act requires that "*[t]he Secretary shall*, in the year 1980 and every 10 years thereafter, take a decennial census of population as of

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the first day of April of such year, which date shall be known as the 'decennial census date', *in such form and content as he may determine*"—not the President. 13 U.S.C. § 141(a) (emphasis added).

200. Section 4 of the Census Act requires the Secretary, *not* the President, to "perform the functions and duties imposed upon him by this title." 13 U.S.C. § 4.

201. The Census Act plainly distinguishes between the Secretary and the President in their roles regarding the Census, as intended by Congress. *See, e.g.*, 13 U.S.C. § 141(b) ("The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported *by the Secretary to the President* of the United States.") (emphasis added); 13 U.S.C. § 21 (distinguishing between "the President" and "the Secretary").

202. The Constitution and Census Act thus make clear that the President has usurped powers Congress has delegated to the Secretary. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

203. The Constitution and Census Act are unambiguous: Congress has constitutional authority over the census, and it has delegated none of that authority to the President. The Memorandum therefore violates the Constitution's separation of powers.

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204. Defendants' constitutional violation causes ongoing harm to Plaintiffs and their members because as explained their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the populations; and provide services to undocumented immigrants, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

205. The Supreme Court has stated, "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Bond v. United States*, 564 U.S. 211, 222 (2011).

206. Defendants' violations of the constitutional separation of powers will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would other, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

207. Defendants' violations of the constitutional separation of powers also causes harm to Plaintiffs and their members because, as explained, some of their

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members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

208. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT FIVE
Administrative Procedure Act
(All Plaintiffs against Defendants Ross, Dillingham, Department of Commerce and Census Bureau)

209. Plaintiffs repeat and re-allege by reference all of the previous factual allegations in this Complaint.

210. The Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, provides for a cause of action against any final agency action, within the meaning of the APA.

211. Upon information and belief, the Department of Commerce has directed the Census Bureau to effectuate the Memorandum's policy of excluding noncitizens from the enumeration used to apportion congressional representation and has instructed the Census Bureau to that effect. This constitutes a final agency action within the meaning of the APA because it marks the consummation of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

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212. In addition, the Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President is required under the Memorandum, and thus the fact that the Secretary will take these actions is indisputable and inevitable. The Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President are separate final agency actions within the meaning of the APA. Requiring Plaintiffs to challenge those mandated final actions after they occur could enable Defendants to evade judicial review.

213. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

214. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum also violates the APA because it is contrary to statutory and constitutional law. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

215. The Census Act requires that this decennial census result in a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" to be reported to the President. 13 U.S.C. § 141(b). This statute has identical meaning as the Constitution, whose mandate it implements: undocumented immigrants are included in the "total population" of each state, and thus must be included in the Census. The statute governing reapportionment, 2 U.S.C. § 2a, provides that after within one week of the first day of the first regular

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session of each Congress following the Census – that is, after receiving the Secretary of Commerce's report pursuant to 13 U.S.C. § 141(b) – the President shall transmit to Congress the population of each state and the number of seats to which it is entitled in the House of Representatives. Like the Census Act, this statute implements the Constitution's requirement that apportionment be based on the total population of each state by mandating that the President's statement to Congress show "the whole number of persons in each State . . . ." 2 U.S.C. § 2a(a). Undocumented immigrants are included within the "whole number of persons in each State" as used in 2 U.S.C. § 2a(a).

216. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because: it relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; and offered an explanation for its decision that runs counter to the evidence before the agency. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

217. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because it changed long-standing, consistent Census Bureau policy without a "reasoned analysis of the change." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

218. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the

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Memorandum is also arbitrary and capricious in violation of the APA because it is the subject of improper political influence and pressure from political actors. *D.C. Fed'n of Civic Assoc. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

219. The Memorandum further violates the APA by effectively abrogating the Residence Rule without going through notice-and-comment rulemaking. The Census Bureau issued the Residence Rule pursuant to notice-and-comment rulemaking. The Census Bureau provided in the Residence Rule that foreign citizens must be "[c]ounted at the U.S. residence where they live and sleep most of the time," 83 Fed. Reg. at 5533, and the Census Bureau confirmed that "[a]pportionment is based on the resident population" as calculated pursuant to the Residence Rule. 83 Fed. Reg. at 5526 n.1. The APA's notice-and-comment requirements prohibit the Census Bureau from calculating the total population of each state in a manner different from that set forth in the Residence Rule without revising or replacing the Residence Rule pursuant to notice-and-comment rulemaking. Neither the President nor the Secretary of Commerce may order the Census Bureau to violate a rule issued pursuant to notice-and-comment rulemaking. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations, Inc.*, 556 U.S. 502.

220. Defendants' violations of the APA will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would

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otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

221. Defendants' violations of the APA also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

222. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

i. Declare that Defendants' exclusion of undocumented immigrants from (a) the tabulation of the total population of the states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states, is unauthorized by and violates the Constitution and laws of the United States;

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ii. Declare that Defendants' exclusion of undocumented immigrants is *ultra vires* and violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)-(b);

iii. Preliminarily and permanently enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

iv. Estop Defendants from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

v. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report the total population of each state under 13 U.S.C § 141(b) based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

vi. Issue a writ of mandamus compelling the President to calculate the whole number of persons in each state and the apportionment of the House of Representatives among the states based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

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vii. Issue a writ of mandamus compelling the President to calculate the apportionment of the House of Representatives among the states based on the method of equal proportions prescribed by Congress;

viii. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

ix. Award any other such additional relief as the Court deems proper.

Dated: July 24, 2020

Respectfully submitted,

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BC-DOC-0000001778

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAI'I, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON; CITY OF CENTRAL FALLS, CITY OF CHICAGO, CITY OF COLUMBUS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PHOENIX, CITY OF PITTSBURGH, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CITY OF SEATTLE; CAMERON COUNTY, EL PASO COUNTY, HIDALGO COUNTY, and MONTEREY COUNTY,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., *in his official capacity as Secretary of Commerce*; BUREAU OF THE CENSUS; and

20 Civ. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BC-DOC-0000001779

STEVEN DILLINGHAM, *in his official capacity as Director of the United States Census Bureau*,

Defendants.

INTRODUCTION

1. This lawsuit challenges President Donald J. Trump's blatant disregard of an unambiguous constitutional command. The Fourteenth Amendment provides 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. The Framers of the Fourteenth Amendment deliberately chose the phrase "whole number of persons" to refer to *all persons living* in each State—including the "entire immigrant population not naturalized." Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Rep. John Bingham).

2. For 150 years—since the United States recognized the whole personhood of those formerly bound in slavery—the unambiguous requirement that all persons be counted for apportionment purposes, regardless of immigration status, has been respected by every executive official, every cabinet officer, and every President.

3. Until now. On July 21, 2020, President Trump issued a "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1). For the first time in our history, the Memorandum announces a "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." *Id.* at 44,680. It directs the Secretary of Commerce to provide the President with information to carry out this policy. And it declares the

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President's intent to make a determination of the "whole number of persons in each State" that will in fact exclude the undocumented immigrants he has targeted throughout his administration.

4. The President's new policy and any actions Defendants take to implement it unequivocally violate the Fourteenth Amendment. The constitutional mandate to base apportionment on "the whole number of persons in each State" could hardly be clearer, and the Supreme Court has long recognized that undocumented immigrants are "persons" under the Fourteenth Amendment, *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Memorandum's open disregard of the Constitution's plain text is reason enough to invalidate it and to prevent Defendants from taking steps to carry out its unlawful policy.

5. But Defendants' decision to exclude undocumented immigrants from apportionment also violates the Constitution and federal statutes in multiple additional ways. Defendants' decision unlawfully discriminates against Hispanics and immigrant communities of color in violation of the Due Process Clause of the Fifth Amendment. By explicitly targeting and punishing States that refuse to assist in this administration's enforcement of federal immigration law, Defendants' decision violates the Tenth Amendment. And Defendants' decision to exclude undocumented immigrants from apportionment—as well as any action they take to implement or further that decision—is both contrary to law and arbitrary and capricious, in violation of the Administrative Procedure Act.

6. Defendants' decision harms Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests. If Defendants succeed in excluding undocumented immigrants from apportionment, some Plaintiffs will suffer severe injury to their most basic rights under our Constitution's representational form of government: they will improperly lose one or more Members in the House of Representatives and one or more corresponding electors in the

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Electoral College. And removing undocumented immigrants from the apportionment base will further harm Plaintiffs by, for example, undermining their ability to conduct congressional and state-level redistricting, depriving them of critical federal funding, and eroding the quality of census data on which they rely to perform essential government functions.

7. Plaintiffs the State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawai'i, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, City of Central Falls, City of Chicago, City of Columbus, City of New York, City of Philadelphia, City of Phoenix, City of Pittsburgh, City of Providence, City and County of San Francisco, City of Seattle, Cameron County, El Paso County, Hidalgo County, and Monterey County therefore bring this action seeking declaratory and injunctive relief to hold Defendants to their obligation to base apportionment on "the whole number of persons in each State" and to forbid them from excluding undocumented immigrants—or any other person—from the apportionment base.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

9. Declaratory and injunctive relief is sought as authorized in 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs the State of New York and the City of New York are residents of this judicial district, and a

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substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

11. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized under N.Y. Executive Law § 63 to pursue this action.

12. Plaintiff the State of Colorado is a sovereign state of the United States of America. The State of Colorado brings this action by and through its Attorney General, Philip J. Weiser. The Attorney General has authority to represent the state, its departments, and its agencies, and "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party." Colo. Rev. Stat. § 24-31-101.

13. Plaintiff the State of Connecticut, represented by and through its Attorney General, William Tong, is a sovereign state of the United States of America. The Attorney General brings this action as the state's chief civil legal officer under Conn. Gen. Stat. § 3-124 *et seq*.

14. Plaintiff the State of Delaware is represented by and through its Attorney General Kathleen Jennings, and is a sovereign state of the United States of America. Attorney General Jennings is Delaware's chief law enforcement officer, *see* Del. Const., art. III, and is authorized to pursue this action under 29 Del. Code § 2504.

15. Plaintiff the District of Columbia is a municipal corporation empowered to sue and be sued, and is the local government for the territory constituting the permanent seat of the federal government. The District brings this case through the Attorney General for the District of Columbia, who is the chief legal officer for the District and possesses all powers afforded the

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Attorney General by the common and statutory law of the District. The Attorney General is responsible for upholding the public interest and has the authority to file civil actions in order to protect the public interest. D.C. Code § 1-301.81.

16. Plaintiff the State of Hawai'i, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Clare E. Connors is the chief legal officer of the State of Hawai'i and is authorized to appear, personally or by deputy, on behalf of the state in all courts and in all cases in which the state is a party. Haw. Const. art. V, § 6; Haw. Rev. Stat. Chapter 28; Haw. Rev. Stat. § 26-7.

17. Plaintiff the State of Illinois, represented by and through its Attorney General, Kwame Raoul, is a sovereign state of the United States of America. The Attorney General is Illinois's chief law enforcement officer and is authorized under 15 ILCS 205/4 to pursue this action.

18. Plaintiff the State of Maryland, by and through its Attorney General, Brian E. Frosh, is a sovereign state of the United States of America. The Attorney General is Maryland's chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General's powers and duties include acting on behalf of the State and the people of Maryland in the federal courts on matters of public concern. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, Joint Resolution 1.

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19. Plaintiff the Commonwealth of Massachusetts, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is authorized to pursue this action under Mass. Gen. Laws ch. 12, §§ 3 and 10.

20. Plaintiff the State of Michigan, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Michigan's chief law enforcement officer and is authorized under Michigan law, Mich. Comp. Laws §§ 14.28 and 14.29, to pursue this action.

21. Plaintiff the State of Minnesota, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Minnesota's chief legal officer and is authorized to pursue this action on behalf of the State. Minn. Stat. § 8.01.

22. Plaintiff the State of Nevada, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Aaron D. Ford is the chief legal officer of the State of Nevada and has the authority to commence actions in federal court to protect the interests of Nevada. Nev. Rev. Stat. § 228.170. Governor Stephen F. Sisolak is the chief executive officer of the State of Nevada. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. Nev. Const., art. 5, § 1.

23. Plaintiff the State of New Jersey, represented by and through its Attorney General Gurbir S. Grewal, is a sovereign state of the United States of America. The Attorney General is New Jersey's chief legal officer and is authorized to pursue this action on behalf of the State. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

24. Plaintiff the State of New Mexico, represented by and through its Attorney General Hector Balderas, is a sovereign state of the United States of America. The Attorney

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General is authorized to bring an action on behalf of New Mexico in any court when, in his judgment, the interests of the State so require, N.M. Stat. Ann. § 8-5-2.

25. Plaintiff the State of North Carolina, represented by and through Attorney General Joshua H. Stein, is a sovereign state of the United States of America. The Attorney General is the State of North Carolina's chief law enforcement officer and brings this challenge pursuant to his independent constitutional, statutory, and common-law authority.

26. Plaintiff the State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

27. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority under 71 Pa. Stat. § 732-204.

28. Plaintiff the State of Rhode Island, represented by and through its Attorney General, is a sovereign state of the United States. Attorney General Peter F. Neronha is the chief legal advisor to the State of Rhode Island and is authorized to pursue this action pursuant to his constitutional, statutory, and common law authority. R.I. Const. art. IX § 12, R.I. Gen. Laws §§ 42-9-1 *et seq.*

29. Plaintiff the State of Vermont, represented by and through its Attorney General, Thomas J. Donovan, is a sovereign state in the United States of America. The Attorney General

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is the state's chief law enforcement officer and is authorized to pursue this action pursuant to Vt. Stat. Ann. tit. 3, §§ 152 and 157.

30. Plaintiff the Commonwealth of Virginia brings this action by and through its Attorney General, Mark R. Herring. The Attorney General has the authority to represent the Commonwealth, its departments, and its agencies in "all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A).

31. Plaintiff the State of Washington, represented by and through its Attorney General, Robert W. Ferguson, is a sovereign state of the United States of America. The Attorney General is the chief legal adviser to the State of Washington and is authorized to pursue this action pursuant to RCW 43.10.030. The Attorney General's powers and duties include acting in federal court on matters of public concern.

32. Plaintiff the City of Central Falls is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

33. Plaintiff the City of Chicago is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Illinois.

34. Plaintiff the City of Columbus is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Ohio and the City's Home Rule Charter.

35. Plaintiff the City of New York is a municipal corporation organized pursuant to the laws of the State of New York. New York City is a political subdivision of the State and derives its powers through the New York State Constitution, New York State laws, and the New York City Charter. New York City is the largest city in the United States by population.

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36. Plaintiff the City of Philadelphia is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

37. Plaintiff the City of Phoenix is a municipal corporation organized pursuant to the laws of the State of Arizona.

38. Plaintiff the City of Pittsburgh is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

39. Plaintiff the City of Providence is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

40. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

41. Plaintiff the City of Seattle is a first-class charter city, incorporated under the laws of the State of Washington, empowered to sue and be sued, and represented by and through its elected City Attorney, Peter S. Holmes.

42. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas.

43. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas.

44. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas.

45. Plaintiff Monterey County, California is a political subdivision of the State of California.

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46. Plaintiffs are aggrieved by Defendants' decision and conduct and have standing to bring this action because Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury unless and until the challenged decision and conduct are enjoined.

47. Defendant Donald J. Trump is the President of the United States. He is responsible for the actions and decisions that are being challenged by Plaintiffs in this action and is sued in his official capacity.

48. Defendant the United States Department of Commerce is a cabinet agency within the executive branch of the United States government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Census. 13 U.S.C. § 4.

49. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is responsible for overseeing the Census Bureau, conducting the decennial census of the population, and reporting to the President the tabulation of total population by States for the apportionment of Representatives in Congress. 13 U.S.C. § 141. He is sued in his official capacity.

50. Defendant Bureau of the Census is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for planning and administering the decennial census.

51. Defendant Steven Dillingham is Director of the Census Bureau. He is sued in his official capacity.

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ALLEGATIONS

I. Constitutional and statutory background.

A. The Constitution requires apportioning Members of the House of Representatives among the States based on the total number of persons living in each State.

52. The Constitution requires that the Members of the House of 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; *see id.* art. I, § 2, cl. 3.

53. The number of Representatives apportioned to each State, along with the two Senators given to each State, determines the allocation among the States of electors in the Electoral College. *Id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3.

54. To apportion Representatives among the States properly (and ultimately to allocate electors among the States properly) the Constitution requires an "actual Enumeration" of the total population every ten years, *id.* art. I, § 2, cl. 3.

55. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and to use that enumeration of the total population "to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019).

56. More than two hundred years of history, practice, and judicial and administrative precedents establish that the apportionment of Representatives must be based on *all persons living* in each State, regardless of their citizenship or immigration status.

57. During the country's founding, the Framers debated the proper basis on which to apportion Representatives and declared that Representatives "shall be apportioned among the

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several States which may be included within this Union, according to their *respective Numbers*." U.S. Const. art. I, § 2, cl. 3 (emphasis added). The Framers repeatedly made clear that the basis for apportionment of Representatives was thus all persons. For example, as James Madison explained in 1788, the "fundamental principle of the proposed constitution" ensured that "the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants." The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001).

58. The original Apportionment Clause provided for only two exceptions to the use of total population for apportionment. First, "Indians not taxed" were excluded from the apportionment base. U.S. Const. art. I, § 2, cl. 1, § 3. Second, slaves were counted as only three-fifth of a person. *Id.* No other exceptions were provided, making clear that all other persons living in the United States needed to be counted by the decennial enumeration and included in the apportionment base.

59. When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats among the States and reaffirmed that apportionment must be based on *all persons living* in each State—citizens and noncitizens alike. The Framers of the Fourteenth Amendment rejected numerous proposals to change the basis of apportionment from total population to voter population. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposal to apportion representatives among the States "according to their respective legal voters").

60. Instead, the Framers amended the Constitution to remove the provision that counted slaves as three-fifths of a person and declared that apportionment of Representatives must be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

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As the Fourteenth Amendment's Framers explained, "numbers," *i.e.*, all persons living in each State, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (Jacob Howard).

61. Basing apportionment on all persons, the Framers further emphasized, ensured that each State's representation in the House reflected all persons regardless of whether they could then vote, including women, children, and the "entire immigrant population not naturalized." *Id.* at 432 (Rep. John Bingham); *see, e.g.*, *id.* at 411 (representation based on number of voters improperly "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)).

62. Since 1790, in accordance with the Constitution's express requirement to base apportionment on all persons living in each State, the decennial actual enumeration has *always* counted all persons living in the United States based on where they "usually reside[]." *See* Census Act of 1790, § 5, 1 Stat. 101 (1790); *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg, 28,950, 28,950 (May 20, 2015) ("The Census Act of 1790 established the concept of 'usual residence' as the main principle in determining where people are to be counted. This concept has been followed in all subsequent censuses.").

63. Under the Census Bureau's well-settled practice and a final rule that it promulgated pursuant to notice-and-comment rulemaking for the 2020 Census, usual residence means the place where a person lives and sleeps most of the time. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

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64. Accordingly, the decennial enumeration and apportionment base includes all noncitizens who live and sleep most of the time in the United States, regardless of their place of citizenship or immigration status. *See, e.g.*, *id.* The enumeration likewise counts noncitizens who are "members of the diplomatic community" "at the embassy, consulate, United Nations' facility, or other residences where diplomats live." *Id.*

65. By contrast, noncitizens who are temporarily visiting the United States, such as on a vacation or business trip, are not included in the decennial enumeration and apportionment base because they do not live and sleep most of the time in the United States. *See, e.g.*, *id.*

66. The millions of undocumented immigrants who do live in the United States have an established presence here. These immigrants have moved to the United States, and they are members of their state and local communities.

67. For example, the Migration Policy Institute has estimated, based on data from 2012 to 2016, that more than nine million undocumented immigrants have lived in the United States for five years or more. The Migration Policy Institute estimated that more than seven million undocumented immigrants have lived in this country for ten years or more, and that nearly four million undocumented immigrants have lived here for twenty years or more.[1]

68. Undocumented immigrants residing here both contribute to and participate in their communities and in many public programs. For example, millions of undocumented immigrants

[1] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

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work here and pay taxes.[2] Many undocumented immigrants live here with their family members, including children who are United States citizens.[3]

69. Based on the Constitution's text, more than two centuries of history, and well-settled census practice, the Supreme Court and other courts have repeatedly made clear that the Fourteenth Amendment requires apportionment of Representatives based on the total number of all persons living in each State. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 10-18 (1964); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). Courts have also repeatedly determined that the "whole number of persons" used to apportion Representatives includes all noncitizens who are living in the United States regardless of their immigration status. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-78 (D.D.C. 1980) (three-judge court).

70. The federal government, and several of the Defendants here, have conceded that the decennial enumeration that constitutes the apportionment base must count all persons living in the United States.

71. For example, on March 14, 2019, Secretary Ross testified under oath during a congressional committee hearing, stating "The constitutional mandate, sir, for the census is to try

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[2] *See, e.g.*, Jens Manuel Krogstad et al., Pew Research Center, *5 facts about illegal immigration in the U.S.* (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s (estimating that in 2017, the United States' civilian workforce included 7.6 million undocumented immigrants); American Immigration Council, *Adding Up the Billions in Tax Dollars Paid by Undocumented Immigrants* 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/adding_up_the_billions_in_tax_dollars_paid_by_undocumented_immigrants.pdf; Hunter Hallman, Bipartisan Policy Center, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer* (Mar. 28, 2018), https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/.

[3] Migration Policy Institute, *supra* (estimating that more than 3 million undocumented immigrants over the age of 15 resided with a citizen child under the age of 18).

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to count *every person residing* in the U.S. at their place of residence on the dates when the census is conducted." *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019) (emphasis added). Secretary Ross further testified that "the Department of Commerce is fully committed to administering as complete and accurate decennial census as we can. We intend to try to *count every person* taking all necessary actions to do so." *Id.* (emphasis added).

72. During a congressional committee hearing in February 2020, Census Bureau Director Dillingham stated that the Bureau will "*count everyone*, wherever they are living," including undocumented immigrants. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (Feb. 12, 2020) (emphasis added).

73. The federal government has repeatedly argued that excluding undocumented immigrants from the decennial enumeration or the apportionment base violates the Constitution and applicable statutes. For example, in *Federation for American Immigration Reform v. Klutznick*, the government urged a district court to reject claims demanding exclusion of undocumented immigrants from the "whole number of persons" that constitutes the apportionment base. The government explained that "the plain language of the Constitution, as well as the intent of its framers, establishes that *all* inhabitants, including illegal aliens, must be enumerated for the purpose of apportioning Representatives."[4]

74. Similarly, the Department of Justice's Office of Legislative Affairs has opined that the Constitution requires inclusion of undocumented immigrants in the decennial

[4] Defs.' Mem. of Points & Authorities in Support of Mot. to Dismiss or for Summary Judgment, No. 79-3269 (D.D.C.), *reprinted in 1980 Census: Counting Illegal Aliens, Hr'gs Before the S. Subcomm. on Energy, Nuclear Proliferation and Federal Services*, 96th Cong. 125-156 (1980).

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enumeration that constitutes the apportionment base. *See, e.g.*, Letter from Carol T. Crawford, Assistant Attorney General, to Senator Jeff Bingham (Sept. 22, 1989).

75. The population count derived from the census is used not only to apportion representatives and ultimately electors "but also to allocate federal funds to the States and to draw electoral districts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

76. For these reasons, the "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997).

B. The Census Act requires that the total population count used for congressional apportionment include all persons living in the United States.

77. The Constitution provides that an "actual Enumeration shall be made" every ten years "in such manner as [Congress] shall direct by law." U.S. Const. art. I, § 2. Congress has exercised its authority over the census by enacting various statutory provisions ("Census Act").

78. Congress has assigned the responsibility of conducting the decennial enumeration to the Secretary of Commerce, and the Secretary may delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141.

79. The Census Act requires that the decennial census be taken on April 1, 2020, the "decennial census date." 13 U.S.C. § 141(a). The Secretary of Commerce has no discretion to delay the decennial census date under the Census Act. *Id.*

80. Within nine months of the decennial census date, *i.e.*, by January 1, 2021, the Secretary of Commerce must report to the President "[t]he tabulation of total population by States" that is "required for the apportionment of Representatives in Congress among the several States." *Id.* § 141(b).

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81. Then, between January 3 and January 8, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a(a).

82. Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives must transmit "to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

II. Defendants' unlawful attempt to add a citizenship question to the decennial census.

83. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are directly related to Secretary Ross's earlier and unlawful attempt to alter the decennial census that provides the apportionment count by adding a question inquiring about citizenship status.

84. On March 26, 2018, Secretary Ross directed the Census Bureau to use the 2020 Census to demand information on the citizenship status of every resident in the country.[5] Secretary Ross stated that he had decided to add the citizenship question because doing so was "necessary to provide complete and accurate data" that would aid enforcement of the Voting Rights Act (VRA) by the Department of Justice.

[5] Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 7 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files" /2018-03-26_2.pdf.

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85. Many of the plaintiffs here filed a lawsuit challenging the addition of the citizenship question as, among other things, arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* Second Am. Compl., *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 210 (S.D.N.Y. filed July 23, 2018).

86. After an eight-day bench trial, the United States District Court for the Southern District of New York vacated Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire. *New York*, 351 F. Supp. 3d at 679. In so ruling, the court concluded that the plaintiffs had standing to sue because the inclusion of a citizenship question would deter participation in the census by households with a noncitizen and lead to a differential undercount of noncitizens and Hispanics that would concretely harm plaintiffs in various ways. *Id.* at 578-593. For example, the court found that adding a citizenship question would cause some plaintiffs to lose congressional seats, impair state and local redistricting efforts that rely on census numbers, harm the quality and accuracy of census data, and reduce federal funding to plaintiffs' jurisdictions. *Id.* at 593-98, 607-15.

87. The court also determined that Secretary Ross's decision violated the Administrative Procedure Act for several reasons, including because his rationale for adding the citizenship question was pretextual. *Id.* at 660-64. As the court explained, the evidence was "clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision [to add the citizenship question] was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Id.* at 660. The court noted that it was "unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were." *Id.* at 569-70.

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88. The Supreme Court granted certiorari before judgment and affirmed, in relevant part, the district court's final judgment setting aside the Secretary's decision to add a citizenship question. The Supreme Court held that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Dep't of Commerce*, 139 S. Ct. at 2573. The Court reasoned that the Secretary's decision "cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA" because there was "a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. In short, Secretary Ross's "VRA enforcement rationale—the sole stated reason—seems to have been contrived." *Id.*

89. After the Supreme Court remanded the case to the district court, the court entered a permanent injunction that enjoined the defendants "from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census." Order, *New York v. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 634 (S.D.N.Y. July 16, 2019).

90. On July 11, 2019, President Trump issued an Executive Order to "ensure that accurate citizenship data is compiled in connection with the census" notwithstanding the Supreme Court's decision and the district court's order precluding the use of a citizenship question in the 2020 Census. *Collecting Information About Citizenship Status in Connection with the Decennial Census*, Exec. Order 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019).

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91. To achieve that goal, President Trump directed all executive departments and agencies to provide to the Department of Commerce "the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country." *Id.*

92. In a public statement accompanying the issuance of the Executive Order, given from the White House's Rose Garden, President Trump made clear that the federal government would not be "backing down on our effort to determine the citizenship status of the United States population." President Donald Trump, *Remarks by President Trump on Citizenship and the Census* (July 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/. President Trump stated that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States.' Now they're trying to erase the very existence of a very important word and a very important thing: citizenship." *Id.*

93. President Trump further stated that, pursuant to the Executive Order, the federal government will be taking steps "to ensure that citizenship is counted so that we know how many citizens we have in the United States." *Id.*

III. The July 21, 2020 Memorandum directing exclusion of undocumented immigrants from the apportionment count.

94. Recent events have now laid bare the real reasons driving Secretary Ross's decision to add a citizenship question to the 2020 Census: to exclude undocumented persons from the "whole number of persons" that constitutes the apportionment base and to discriminate against Hispanics and noncitizens.

95. On July 21, 2020, President Trump issued a memorandum (i) declaring that undocumented immigrants will be excluded from the "whole number of persons in each State" enumerated by the 2020 Census and used to apportion the number of Representatives to each State, and (ii) directing the Secretary to take "all appropriate action" to provide the President

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with information to exclude undocumented immigrants from the apportionment base. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1).

96. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 Census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible." *Id.* at 44,680.

97. The Memorandum asserts that the Executive branch has purported "discretion" to exclude from the apportionment base all undocumented immigrants who reside in the United States, *id.* at 44,679—no matter how long they have been living here.

98. The Memorandum acknowledges that the Constitution explicitly requires apportionment of Representatives based on the "whole number of persons in each State." *Id.* It states that not every person who is physically present on the decennial census date is living in the United States. *Id.* For example, the Memorandum states, noncitizens who are temporarily visiting on vacation or for business are not "inhabitants" of the United States and are thus not included in the apportionment base. *Id.* Without any plausible basis, the Memorandum then asserts that purported "discretion delegated to the executive branch to determine who qualifies as an 'inhabitant' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status"—even if those persons have been living in the United States for many years. *Id.*

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99. In the Memorandum, President Trump targets States (including some of the plaintiff States) that have many undocumented immigrants living in their jurisdictions or that have declined to affirmatively assist the federal government's immigration enforcement efforts.

100. For example, President Trump stated that "[a]ffording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* at 44,680. The Memorandum further stated that States that decline to adopt state laws or policies to assist federal efforts to enforce the immigration laws passed by Congress should essentially be stripped of any "representation in the House of Representatives" that is based on undocumented immigrants living in their jurisdictions. *Id.*

101. The Memorandum requires Secretary Ross, in preparing his § 141(b) report of the actual enumeration on which apportionment must be based, to take actions "to provide information" to the President to exclude undocumented immigrants from apportionment. *Id.* The Memorandum thus directs the Secretary (and by extension the Commerce Department and Census Bureau) to take actions to enable the President to exclude undocumented immigrants from his § 2a(a) report of both the "whole number of persons in each State" and the corresponding number of Representatives that each State receives. *Id.*

102. On the same day that he issued the Memorandum, President Trump issued a public statement making clear that Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are a continuation of the federal government's prior unlawful attempt to add a citizenship question to the 2020 Census. President Donald Trump,

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Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

103. As President Trump's statement explained, he had previously asserted during his Rose Garden statements in July 2019 that he "would not back down in [his] effort to determine the citizenship status of the United States population." *Id.* He further explained that he was now following "through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." *Id.* Echoing his earlier statements about the citizenship question, Trump further asserted that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States'" and that "the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country." *Id.* He stated that his Memorandum directing exclusion of undocumented immigrants from the apportionment base responds to a purported "broader left-wing effort to erode the rights of Americans citizens." *Id.*

104. Upon information and belief, following receipt of the Memorandum, the Secretary or Department of Commerce has issued (or will imminently issue) directives to the Census Bureau, constituting final agency action, to implement President Trump's directive to exclude noncitizens from the enumeration and apportionment base.

IV. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color.

105. The Memorandum explicitly states that its goal is to reduce political influence and congressional representation to jurisdictions with a larger share of undocumented immigrants. 85 Fed. Reg. at 44,680.

106. President Trump has repeatedly articulated concerns about the growth of immigrant communities and the impact of that growth on political power, and has sought to

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minimize the power of Hispanic and immigrant communities to increase the power of non-Hispanic whites.

107. During the 2016 presidential campaign, for example, President Trump tweeted: "How crazy—7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[6]

108. On April 5, 2018, when discussing his opposition to family-based immigration systems, President Trump claimed that Democrats favor "chain migration" because the party believes the immigrants will "vote Democratic." Three weeks later, on April 28, President Trump revisited this topic, stating that Democrats favor undocumented immigration because "all of these people that are pouring across are going to vote for Democrats, they're not going to vote for Republicans."[7]

109. Defendants' exclusion of undocumented immigrants from the apportionment base is of a piece with President Trump's anti-immigrant and anti-Hispanic rhetoric and his Administration's targeting of immigrant and Hispanic communities, which reflect animus towards those groups.

110. President Trump has long engaged in rhetoric that disparages Hispanics and immigrants of color. In statements stretching back to the beginning of his campaign, President Trump has repeatedly dehumanized, devalued, and vilified immigrants in general, and specifically immigrants from Latin America. For instance:

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[6] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[7] Fox News (@FoxNews), Twitter (Apr. 28, 2018), https://twitter.com/foxnews/status/990383288232620032.

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a. During his campaign launch in June 2015, President Trump claimed that "[w]hen Mexico sends its people. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from more than Mexico. It's coming from all over South and Latin America."[8]

b. During a meeting about recent immigrants in the Oval Office in June 2017, President Trump stated that 15,000 immigrants from Haiti "all have AIDS" and that 40,000 immigrants from Nigeria would never "go back to their huts" in Africa after seeing the United States.[9]

c. During a January 2018 meeting with lawmakers, while discussing protections for immigrants from Haiti, El Salvador and other African countries, President Trump asked why the United States is "having all these people from shithole countries come here" and suggested that the United States should have more immigrants from countries like Norway.[10]

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[8] *Full text: Donald Trump announces a presidential bid*, Wash. Post, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

[9] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[10] Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as 'shithole' countries*, Jan. 12, 2018, https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946.

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d. In a May 16, 2018 speech, President Trump stated that "[w]e have people coming into the country, or trying to come in . . . . You wouldn't believe how bad these people are. These aren't people, these are animals."[11]

e. Speaking on the topic of migrant groups travelling to the United States from Central America at a rally on May 8, 2019, President Trump, stated, "[W]hen you see these caravans starting out with 20,000 people, that's an invasion."[12]

111. President Trump has acted on this rhetoric by adopting policies that seek to isolate, exclude, and instill fear in Hispanic immigrants and other immigrants of color. For instance, the Trump Administration has:

a. Attempted to rescind the Deferred Action for Childhood Arrivals program, which protected 800,000 individuals, 90% of whom were Hispanic and 80% of whom were Mexican-American;

b. Banned travel from several majority-Muslim countries;

c. Suspended refugee admissions to the United States;

d. Terminated special protections from removal for migrants from nations experiencing war and natural disasters, including Nicaragua, Honduras, Haiti and El Salvador;

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[11] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[12] *President Trump Holds Rally in Panama City Beach, Florida*, C-SPAN (May 8, 2019) (video), https://www.c-span.org/video/?460412-1/president-trump-holds-rally-panama-city-beach-florida.

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e. Increased actual and threatened raids and deportations of undocumented migrants, including, as recently as June 17, 2019, when President Trump tweeted a threat that "[n]ext week ICE will begin the process of removing the millions of illegal aliens who have illicitly found their way into the United States. They will be removed as fast as they come in";[13]

f. Attempted to build a physical wall along the Mexico-U.S. border;

g. Adopted policies of separating children from their families when entering the United States from Mexico, and detaining children separate from their parents and families thereafter; and

h. Maintained children and other migrants across the U.S.-Mexico border in detention facilities that the United Nations Children's Fund has described as "dire" and as causing "irreparable harm" to children housed in them.[14]

112. These public statements and actions from Defendant Trump establish that the rationale for excluding undocumented immigrants from the apportionment base is motivated by racial animus against immigrants of color, and a desire to curb the political power of immigrant communities of color.

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[13] Nick Miroff & Maria Sacchetti, *Trump vows mass immigration arrests, removals of 'millions of illegal aliens' starting next week*, Wash. Post, June 17, 2019, https://www.washingtonpost.com/immigration/trump-vows-mass-immigration-arrests-removals-of-millions-of-illegal-aliens-starting-next-week/2019/06/17/4e366f5e-916d-11e9-aadb-74e6b2b46f6a_story.html?utm_term=.ece5e6a6b7e6.

[14] *After Rio Grande tragedy, UNICEF chief highlights "dire" detention centres on US-Mexico border*, UN News (June 27, 2019), https://news.un.org/en/story/2019/06/1041421.

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V. Plaintiffs are harmed by Defendants' decision to exclude undocumented immigrants from the apportionment base.

113. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests because they will cause some Plaintiffs to lose congressional seats and decrease their share of presidential electors in the Electoral College; skew the division of electoral districts within Plaintiffs' jurisdictions by impairing state and local redistricting efforts that rely on the census count; reduce federal funds to Plaintiffs' jurisdictions by deterring immigrants from responding to the decennial census that is currently underway; and degrade the quality of census data that Plaintiffs rely on to perform critical governmental functions.

114. First, excluding undocumented immigrants from the apportionment count will likely cause several States to lose one or more Representatives in Congress, directly harming those Plaintiff States, as well as those Plaintiff counties and cities within affected States, by diluting their political power and undermining their interest in fair congressional representation.

115. For example, large numbers of undocumented immigrants reside in California, Texas, New York, New Jersey, and Illinois.[15] Defendants' decision to exclude undocumented immigrants from the apportionment count is likely to directly reduce representation for those jurisdictions in Congress, injuring the representational interests of Plaintiffs the State of New York, State of New Jersey, State of Illinois, City of Chicago, City of New York, City and County of San Francisco, Cameron County, El Paso County, Hidalgo County, and Monterey County.

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[15] Pew Research Center, November 27, 2018, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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Other Plaintiffs may also suffer direct representational harms if undocumented individuals are excluded from the apportionment count.

116. The Memorandum itself acknowledges and intends these harms. *See* 85 Fed. Reg. at 44,680 (recognizing that excluding undocumented immigrants will "result in the allocation" of fewer congressional seats "than would otherwise be allocated" to some states).

117. The loss of a congressional seat will also cause the affected Plaintiff States, counties, and cities to lose one or more votes in the Electoral College, impairing their ability to elect the President and Vice President and harming their political power.

118. Second, excluding undocumented immigrants from the apportionment base will harm Plaintiffs' representational interests by directly impairing Plaintiffs' ability to draw accurate districting lines for congressional, state, or local legislative districts.

119. To comply with the Fourteenth Amendment's one-person, one-vote requirement, States must use total population as the population base for congressional redistricting. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"); *see Evenwel*, 136 S. Ct. at 1129. Defendants' decision to exclude undocumented immigrants from the apportionment base will undermine Plaintiff States' ability to comply with this Constitutional mandate.

120. Certain Plaintiffs are required by state constitutional or statutory provisions to use the total population count from the decennial census as the basis for redistricting within their jurisdictions. New York state law provides, for example, that "each federal census taken decennially . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of

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senate and assembly districts." N.Y. Const. art. III, § 4(a); *see also id.* §§ 3-5, 5-a. Many of the other Plaintiffs have comparable laws.[16]

121. Third, excluding undocumented immigrants from the apportionment base will deprive Plaintiffs of critical federal funding and inflict substantial financial harms on Plaintiffs.

122. Political science literature establishes that States that lose seats in Congress typically see a decrease in their share of federal outlays in subsequent years due to the reduction in their voting power in Congress. *See, e.g.*, Roy Elis, Neil Malhotra, & Marc Meredith, *Apportionment Cycles as Natural Experiments*, Political Analysis 358-76 (2009). Those Plaintiffs likely to lose representation in Congress therefore also stand to lose critical federal resources as a result.

123. All Plaintiffs will further suffer financial harm because Defendants' decision to exclude undocumented immigrants from the apportionment base will deter participation in the ongoing decennial census, undermining the Census Bureau's efforts to count immigrants and their families, and depriving Plaintiffs of their fair share of census-derived federal funds.

124. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants.[17] Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. These

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[16] *See, e.g.*, Chicago Municipal code § 2-8-300; D.C. Code § 1-1011.01; Mass. Const. Amend. art. CI, §§ 1, 2, arts. CIX, CXVII, CXIX; Nev. Const. art. IV, § 5, art. XV, § 13; Tex. Const. art. 3, § 26; Va. Code Ann. § 30-265; Vt. Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902; Wash. Const. art. II, § 43; Wash. Rev. Code §§ 29A.76.010, 44.05.090.

[17] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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households are already less likely to respond to the census questionnaire; this Administration's ongoing efforts to target immigrants—including Defendants' failed efforts to add a citizenship question to the decennial census—have engendered substantial fear within these communities.[18]

125. The COVID-19 pandemic has further hampered efforts to ensure that all people—including hard-to-count populations—are counted. For example, the census relies upon non-response follow up operations (NRFU) to contact potential respondents and increase the census response rate. But NRFU operations were suspended and delayed during the pandemic, and the Government Accountability Office has raised concerns that even when resumed, these efforts will be less effective in light of the virus.[19]

126. Defendants' decision to exclude undocumented immigrants from the apportionment base was announced just weeks before Census Bureau enumerators were finally scheduled to go into the field to encourage households to respond to the census,[20] creating confusion and further increasing the risk of an undercount.

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[18] *See, e.g.*, Alexandra Schmidt, *Citizenship question is gone. Michigan immigrants still distrust the Census*, (Mar. 2, 2020), https://www.bridgemi.com/michigan-government/citizenship-question-gone-michigan-immigrants-still-distrust-census (noting ongoing "fear among immigrants about what the government will do with information collected in the count").

[19] *See* U.S. Government Accountability Office, *2020 Census: COVID-19 Presents Delays and Risks to Census Count* https://www.gao.gov/products/GAO-20-551R#summary.

[20] U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19*, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited July 24, 2020).

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127. The announcement of Defendants' decision was intended to promote fear and deter participation in the census by immigrants and their families, including through the President's remarks that he "will not stand" for efforts to "conceal the number" of immigrants.[21]

128. The Census Bureau has repeatedly emphasized that "[e]veryone counts," citizens and noncitizens alike.[22] But Defendants' decision and actions to exclude undocumented immigrants from the apportionment base do the opposite. Excluding undocumented immigrants from the apportionment count communicates to immigrants that their census responses are less valuable and less important than those of citizens.

129. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. At least 320 federal domestic financial assistance programs rely on census data to allocate money; in fiscal year 2016, these programs "allocated about $900 billion using census-derived data." *New York*, 351 F. Supp. 3d at 596. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. The reduction in census participation caused by Defendants' announcement that they will exclude undocumented immigrants from the apportionment base will harm Plaintiffs by depriving them of their statutory fair share of federal funding and removing crucial resources for important government services.

130. Finally, by deterring immigrants and their families from responding to the decennial census, Defendants' decision to exclude undocumented immigrations from the apportionment base will degrade the quality of census data. As census self-response rates

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[21] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

[22] *See, e.g.*, Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html.

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decline, the quality of the data—including information relating to population subgroups and their characteristics—worsens. But Plaintiffs "rely on accurate data to perform essential governmental functions," including to draw school zones, deploy health care resources, and make infrastructure decisions. *Id.* at 600. Defendants' decision will therefore undermine Plaintiffs' interests in using accurate census data to perform critical governmental functions.

VI. Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants.

131. Defendants cannot reliably exclude undocumented immigrants from the apportionment count. Just months ago, the Federal Government represented in separate litigation that there is a "lack of accurate estimates of the resident undocumented population" on a state-by-state basis.[23]

132. Although a previous executive order suggests that the Census Bureau may rely on administrative records to identify *noncitizens*, *see* 84 Fed. Reg. at 33,821, many noncitizens are lawfully present; and administrative records cannot provide sufficiently reliable or accurate information about whether noncitizens are *undocumented*, particularly for actual enumeration and apportionment purposes. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[24] The limited administrative records available with respect to undocumented immigrants are incomplete, outdated, and often inaccurate.

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[23] Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. Mar. 13, 2020).

[24] John L. Czajka, *Can Administrative Records Be Used to Reduce Nonresponse Bias?*, 645 Annals Am. Acad. Pol. & Social Sci. 171, 175 (2013).

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133. For example, the Department of Homeland Security (DHS) recently acknowledged that determining immigration status from their records is "challenging," given the "the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system."[25] DHS has acknowledged that time lags between collecting and reporting data mean that "data accuracy issues may arise."[26] Even when used in combination, existing administrative records are inadequate to ascertain reliably whether individuals are undocumented.

134. Although the federal government has already suggested that they may resort to "statistical modeling" to estimate the undocumented population in furtherance of the Presidential Memorandum, the Census Bureau has not yet "formulated a methodology,"[27] and Defendants have not articulated how such statistical modeling will comport with their constitutional obligation to conduct an "actual Enumeration." U.S. Const. art. 1, § 2, cl. 3.

135. Despite Defendants' failure to identify any reliable method to accurately enumerate the population of undocumented immigrants, Defendants have already decided to report that population to the President and to exclude that population from the tabulation of total population reported to Congress. Defendants' commitment to proceeding on this course of action without regard to the unreliability or inaccuracy of their underlying enumeration demonstrates that they have prejudged the decision, violates their statutory obligations to report

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[25] Department of Homeland Security, *Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau*, 2, 11 (Dec. 20, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf.

[26] *Id.* at 6.

[27] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985.

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total population, and confirms the irrational and arbitrary nature of their decision and actions to exclude undocumented immigrants from the actual enumeration and apportionment base.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(U.S. Constitution article I, section 2, clause 3; U.S. Constitution amend. XIV, sec. 2)

136. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

137. The Constitution requires that "Representatives shall 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; *see id.* art. I, § 2, cl. 3.

138. Undocumented immigrants are persons. *Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

139. Defendants' decision to exclude undocumented immigrants from the apportionment base for the purpose of reapportionment of Representatives following the 2020 Census, as well as any action they take to implement or further that decision, violates the constitutional command to apportion Representatives "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

140. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF

(U.S. Constitution amend. V—Due Process Clause)

141. Plaintiff States incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

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142. Under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal government cannot deny to any person the equal protection of its laws. The Due Process Clause specifically prohibits the federal government from discriminating against individuals on the basis of race, ethnicity, and national origin. U.S. Const. amend. V.

143. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color. This animus is reflected in Defendants' repeated statements vilifying these communities.

144. The highly unusual chronology of events, sharp departure from centuries of past practice, articulation of a pretextual reason for Defendants' now-enjoined efforts to demand citizenship information on the decennial census questionnaire, and disproportionate burden of Defendants' decision on Hispanics and immigrant communities of color further indicate that Defendants' decision is motivated by unconstitutional discriminatory purpose.

145. By excluding undocumented immigrants from the apportionment base, Defendants intend to reduce political power, influence, and funding resources among Hispanic and immigrant communities as compared to non-Hispanic whites.

146. Defendants' violation causes ongoing harm to Plaintiff States and their residents.

THIRD CLAIM FOR RELIEF

(U.S. Constitution amend. X)

147. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

148. The Tenth Amendment prohibits the federal government from coercing states and localities to legislate or promote policies that capitulate to federal interests.

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149. Defendants' decision to exclude undocumented immigrants from the apportionment count punishes Plaintiffs for refusing to assist in the enforcement of federal immigration law, in an attempt to coerce Plaintiffs to change their policies. 85 Fed. Reg. at 44,680.

150. The Tenth Amendment requires the federal government to respect the equal sovereignty of the sovereign states.

151. Without adequate justification, Defendants' decision to exclude undocumented immigrants from the apportionment count impermissibly targets certain states for unfavorable treatment because of their refusal to assist in the enforcement of federal immigration law. 85 Fed. Reg. at 44,680.

152. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

FOURTH CLAIM FOR RELIEF

(Administrative Procedure Act, 5 U.S.C. § 706)

153. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

154. The Administrative Procedure Act provides that the Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

155. Defendants' decision to exclude undocumented immigrants from the apportionment base, as well as any action they take to implement or further that decision, is arbitrary and capricious because it is contrary to the evidence before the agency and fails to consider important aspects of the problem, including that Defendants lack data reliably to exclude undocumented immigrants from the apportionment base.

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156. Defendants' decision and any implementing actions they undertake are also not in accordance with law because the Census Act requires the Secretary to tabulate and report to the President a tabulation of "total population by States . . . as required for apportionment of Representatives in Congress." 13 U.S.C. § 141(b).

157. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census, as well as any action they take to implement or further that decision, is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census is intentionally discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment;

3. Declare that Defendants' decision and any implementing actions they take are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

4. Enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy;

5. Issue an order holding unlawful, vacating, and setting aside the decision to exclude undocumented immigrants from the apportionment base, as well as any action taken to implement or further that decision;

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6. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report to the President the total population by States under 13 U.S.C § 141(b) based solely on the total number of persons in each State, including undocumented immigrants, without providing any information about the number of undocumented immigrants in each State.

7. Issue a writ of mandamus compelling the President to transmit to Congress pursuant to 2 U.S.C. § 2a(a) a statement of the whole number of persons in each State, and 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, based on the total number of residents of each state, including undocumented immigrants.

8. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and

9. Grant such other and further relief as the Court deems just and proper.

DATED: July 24, 2020

Respectfully submitted,

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* Application for *pro hac vice* admission forthcoming

BC-DOC-0000001827

Exhibit 1

Federal Register
Vol. 85, No. 142
Thursday, July 23, 2020

Presidential Documents

Title 3—

The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the ''whole number of persons in each State,'' which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is ''the President's personal transmittal of the report to Congress'' that ''settles the apportionment'' of Representatives among the States, and the President's discretion to settle the apportionment is more than ''ceremonial or ministerial'' and is essential ''to the integrity of the process'' (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the ''persons in each State, excluding Indians not taxed,'' to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term ''persons in each State'' has been interpreted to mean that only the ''inhabitants'' of each State should be included. Determining which persons should be considered ''inhabitants'' for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are ''persons'' who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically ''in'' a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an ''inhabitant'' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

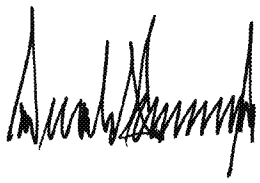
Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
Washington, July 21, 2020

[FR Doc. 2020–16216
Filed 7–22–20; 2:00 pm]
Billing code 3510–07–P

Sent: 8/24/2020 7:18:19 AM
To: Ali Mohammad Ahmad (CENSUS/ADCOM FED) [ali.m.ahmad@census.gov]; Cannon, Michael (Federal) [MCannon@doc.gov]
CC: Ryan, Miles F III [miles.f.ryan.iii@census.gov]; Foti, Anthony (Federal) [AFoti@doc.gov]; Brebbia, Sean (Federal) [SBrebbia@doc.gov]; Heller, Megan (Federal) [MHeller@doc.gov]; DiGiacomo, Brian (Federal) [bDiGiaco@doc.gov]; Keller, Catherine (Federal) [CKeller@doc.gov]
Subject: RE: Materials for Director
Attachments: 1_20cv2023 Common Cause Et Al V. Trump Et Al Complaint.pdf; New York Case.pdf; NYIC Complaint.pdf; b(5) - WP b(5) - WP RE: New Census related Complaints

All,

b(5) - DP/AC/WP

Please let us know if you have any questions or if we can be of any additional assistance.

Thank you,

Stephanie Olson
Acting Deputy General Counsel for Litigation
D: 202.482.5981
M: b(6)

-----Original Message-----
From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Sunday, July 26, 2020 5:10 PM
To: Cannon, Michael (Federal) <MCannon@doc.gov>
Cc: Ryan, Miles F III <miles.f.ryan.iii@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>; Sprung, Michael J <michael.j.sprung@census.gov>; Smith, Steven K <steven.k.smith@census.gov>; Lang, Alan <alan.lang@census.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>; Foti, Anthony (Federal) <AFoti@doc.gov>; Brebbia, Sean (Federal) <SBrebbia@doc.gov>; Creech, Melissa L <melissa.l.creech@census.gov>
Subject: Re: Materials for Director

Thank you!!

> On Jul 26, 2020, at 4:53 PM, Cannon, Michael (Federal) <MCannon@doc.gov> wrote:
>
> CUI//PRIVILEGE//FED ONLY

b(5) - AC/WP

> Best,
>
> Mike
>
> Michael A. Cannon
> Chief Counsel for Economic Affairs
> Office of the General Counsel
> U.S. Department of Commerce
> Telephone: (202) 482-5395
> Cell: b(6)
> Email: mcannon@doc.gov
>
> Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.
>
> -----Original Message-----
> From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
> Sent: Sunday, July 26, 2020 4:19 PM

> To: Cannon, Michael (Federal) <MCannon@doc.gov>
> Cc: Ryan, Miles F III <miles.f.ryan.iii@census.gov>; Stanley, Christopher J <christopher.j.stanley@census.gov>; Sprung, Michael J <michael.j.sprung@census.gov>; Smith, Steven K <steven.k.smith@census.gov>; Lang, Alan <alan.lang@census.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>
> Subject: Re: Materials for Director
>
> Totally understand. Just passing this on: On a call now he just suggested he'd like it tonight but would need it tomorrow am.
>
>> On Jul 26, 2020, at 4:15 PM, Cannon, Michael (Federal) <MCannon@doc.gov> wrote:
>>
>> Ali, thanks for the email. We are working on getting it to the Director as soon as we can.
>>
>> Thanks.
>>
>> Mike
>>
>> Michael A. Cannon
>> Chief Counsel for Economic Affairs
>> Office of the General Counsel
>> U.S. Department of Commerce
>> Telephone: (202) 482-5395
>> Cell: b(6)
>> Email: mcannon@doc.gov
>>
>> Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.
>>
>> -----Original Message-----
>> From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
>> Sent: Sunday, July 26, 2020 4:13 PM
>> To: Cannon, Michael (Federal) <MCannon@doc.gov>; Ryan, Miles F III <miles.f.ryan.iii@census.gov>
>> Cc: Stanley, Christopher J <christopher.j.stanley@census.gov>; Sprung, Michael J <michael.j.sprung@census.gov>; Smith, Steven K <steven.k.smith@census.gov>; Lang, Alan <alan.lang@census.gov>
>> Subject: Materials for Director
>>
>> Mike and Miles:
>>
>> The Director mentioned that you two would be providing some material. Could that be delivered first thing Monday morning?
> <Census Case Briefs 7.24.20.docx>

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

---

[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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

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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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAI'I, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON; CITY OF CENTRAL FALLS, CITY OF CHICAGO, CITY OF COLUMBUS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PHOENIX, CITY OF PITTSBURGH, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CITY OF SEATTLE; CAMERON COUNTY, EL PASO COUNTY, HIDALGO COUNTY, and MONTEREY COUNTY,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., *in his official capacity as Secretary of Commerce*; BUREAU OF THE CENSUS; and

20 Civ. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BC-DOC-0000001865

STEVEN DILLINGHAM, *in his official capacity as Director of the United States Census Bureau*,

Defendants.

INTRODUCTION

1. This lawsuit challenges President Donald J. Trump's blatant disregard of an unambiguous constitutional command. The Fourteenth Amendment provides 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. The Framers of the Fourteenth Amendment deliberately chose the phrase "whole number of persons" to refer to *all persons living* in each State—including the "entire immigrant population not naturalized." Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Rep. John Bingham).

2. For 150 years—since the United States recognized the whole personhood of those formerly bound in slavery—the unambiguous requirement that all persons be counted for apportionment purposes, regardless of immigration status, has been respected by every executive official, every cabinet officer, and every President.

3. Until now. On July 21, 2020, President Trump issued a "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1). For the first time in our history, the Memorandum announces a "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." *Id.* at 44,680. It directs the Secretary of Commerce to provide the President with information to carry out this policy. And it declares the

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President's intent to make a determination of the "whole number of persons in each State" that will in fact exclude the undocumented immigrants he has targeted throughout his administration.

4. The President's new policy and any actions Defendants take to implement it unequivocally violate the Fourteenth Amendment. The constitutional mandate to base apportionment on "the whole number of persons in each State" could hardly be clearer, and the Supreme Court has long recognized that undocumented immigrants are "persons" under the Fourteenth Amendment, *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Memorandum's open disregard of the Constitution's plain text is reason enough to invalidate it and to prevent Defendants from taking steps to carry out its unlawful policy.

5. But Defendants' decision to exclude undocumented immigrants from apportionment also violates the Constitution and federal statutes in multiple additional ways. Defendants' decision unlawfully discriminates against Hispanics and immigrant communities of color in violation of the Due Process Clause of the Fifth Amendment. By explicitly targeting and punishing States that refuse to assist in this administration's enforcement of federal immigration law, Defendants' decision violates the Tenth Amendment. And Defendants' decision to exclude undocumented immigrants from apportionment—as well as any action they take to implement or further that decision—is both contrary to law and arbitrary and capricious, in violation of the Administrative Procedure Act.

6. Defendants' decision harms Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests. If Defendants succeed in excluding undocumented immigrants from apportionment, some Plaintiffs will suffer severe injury to their most basic rights under our Constitution's representational form of government: they will improperly lose one or more Members in the House of Representatives and one or more corresponding electors in the

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Electoral College. And removing undocumented immigrants from the apportionment base will further harm Plaintiffs by, for example, undermining their ability to conduct congressional and state-level redistricting, depriving them of critical federal funding, and eroding the quality of census data on which they rely to perform essential government functions.

7. Plaintiffs the State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawai'i, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, City of Central Falls, City of Chicago, City of Columbus, City of New York, City of Philadelphia, City of Phoenix, City of Pittsburgh, City of Providence, City and County of San Francisco, City of Seattle, Cameron County, El Paso County, Hidalgo County, and Monterey County therefore bring this action seeking declaratory and injunctive relief to hold Defendants to their obligation to base apportionment on "the whole number of persons in each State" and to forbid them from excluding undocumented immigrants—or any other person—from the apportionment base.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

9. Declaratory and injunctive relief is sought as authorized in 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs the State of New York and the City of New York are residents of this judicial district, and a

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substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

11. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized under N.Y. Executive Law § 63 to pursue this action.

12. Plaintiff the State of Colorado is a sovereign state of the United States of America. The State of Colorado brings this action by and through its Attorney General, Philip J. Weiser. The Attorney General has authority to represent the state, its departments, and its agencies, and "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party." Colo. Rev. Stat. § 24-31-101.

13. Plaintiff the State of Connecticut, represented by and through its Attorney General, William Tong, is a sovereign state of the United States of America. The Attorney General brings this action as the state's chief civil legal officer under Conn. Gen. Stat. § 3-124 *et seq*.

14. Plaintiff the State of Delaware is represented by and through its Attorney General Kathleen Jennings, and is a sovereign state of the United States of America. Attorney General Jennings is Delaware's chief law enforcement officer, *see* Del. Const., art. III, and is authorized to pursue this action under 29 Del. Code § 2504.

15. Plaintiff the District of Columbia is a municipal corporation empowered to sue and be sued, and is the local government for the territory constituting the permanent seat of the federal government. The District brings this case through the Attorney General for the District of Columbia, who is the chief legal officer for the District and possesses all powers afforded the

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Attorney General by the common and statutory law of the District. The Attorney General is responsible for upholding the public interest and has the authority to file civil actions in order to protect the public interest. D.C. Code § 1-301.81.

16. Plaintiff the State of Hawai'i, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Clare E. Connors is the chief legal officer of the State of Hawai'i and is authorized to appear, personally or by deputy, on behalf of the state in all courts and in all cases in which the state is a party. Haw. Const. art. V, § 6; Haw. Rev. Stat. Chapter 28; Haw. Rev. Stat. § 26-7.

17. Plaintiff the State of Illinois, represented by and through its Attorney General, Kwame Raoul, is a sovereign state of the United States of America. The Attorney General is Illinois's chief law enforcement officer and is authorized under 15 ILCS 205/4 to pursue this action.

18. Plaintiff the State of Maryland, by and through its Attorney General, Brian E. Frosh, is a sovereign state of the United States of America. The Attorney General is Maryland's chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General's powers and duties include acting on behalf of the State and the people of Maryland in the federal courts on matters of public concern. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, Joint Resolution 1.

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19. Plaintiff the Commonwealth of Massachusetts, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is authorized to pursue this action under Mass. Gen. Laws ch. 12, §§ 3 and 10.

20. Plaintiff the State of Michigan, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Michigan's chief law enforcement officer and is authorized under Michigan law, Mich. Comp. Laws §§ 14.28 and 14.29, to pursue this action.

21. Plaintiff the State of Minnesota, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Minnesota's chief legal officer and is authorized to pursue this action on behalf of the State. Minn. Stat. § 8.01.

22. Plaintiff the State of Nevada, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Aaron D. Ford is the chief legal officer of the State of Nevada and has the authority to commence actions in federal court to protect the interests of Nevada. Nev. Rev. Stat. § 228.170. Governor Stephen F. Sisolak is the chief executive officer of the State of Nevada. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. Nev. Const., art. 5, § 1.

23. Plaintiff the State of New Jersey, represented by and through its Attorney General Gurbir S. Grewal, is a sovereign state of the United States of America. The Attorney General is New Jersey's chief legal officer and is authorized to pursue this action on behalf of the State. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

24. Plaintiff the State of New Mexico, represented by and through its Attorney General Hector Balderas, is a sovereign state of the United States of America. The Attorney

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General is authorized to bring an action on behalf of New Mexico in any court when, in his judgment, the interests of the State so require, N.M. Stat. Ann. § 8-5-2.

25. Plaintiff the State of North Carolina, represented by and through Attorney General Joshua H. Stein, is a sovereign state of the United States of America. The Attorney General is the State of North Carolina's chief law enforcement officer and brings this challenge pursuant to his independent constitutional, statutory, and common-law authority.

26. Plaintiff the State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

27. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority under 71 Pa. Stat. § 732-204.

28. Plaintiff the State of Rhode Island, represented by and through its Attorney General, is a sovereign state of the United States. Attorney General Peter F. Neronha is the chief legal advisor to the State of Rhode Island and is authorized to pursue this action pursuant to his constitutional, statutory, and common law authority. R.I. Const. art. IX § 12, R.I. Gen. Laws §§ 42-9-1 *et seq.*

29. Plaintiff the State of Vermont, represented by and through its Attorney General, Thomas J. Donovan, is a sovereign state in the United States of America. The Attorney General

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is the state's chief law enforcement officer and is authorized to pursue this action pursuant to Vt. Stat. Ann. tit. 3, §§ 152 and 157.

30. Plaintiff the Commonwealth of Virginia brings this action by and through its Attorney General, Mark R. Herring. The Attorney General has the authority to represent the Commonwealth, its departments, and its agencies in "all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A).

31. Plaintiff the State of Washington, represented by and through its Attorney General, Robert W. Ferguson, is a sovereign state of the United States of America. The Attorney General is the chief legal adviser to the State of Washington and is authorized to pursue this action pursuant to RCW 43.10.030. The Attorney General's powers and duties include acting in federal court on matters of public concern.

32. Plaintiff the City of Central Falls is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

33. Plaintiff the City of Chicago is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Illinois.

34. Plaintiff the City of Columbus is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Ohio and the City's Home Rule Charter.

35. Plaintiff the City of New York is a municipal corporation organized pursuant to the laws of the State of New York. New York City is a political subdivision of the State and derives its powers through the New York State Constitution, New York State laws, and the New York City Charter. New York City is the largest city in the United States by population.

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36. Plaintiff the City of Philadelphia is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

37. Plaintiff the City of Phoenix is a municipal corporation organized pursuant to the laws of the State of Arizona.

38. Plaintiff the City of Pittsburgh is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

39. Plaintiff the City of Providence is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

40. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

41. Plaintiff the City of Seattle is a first-class charter city, incorporated under the laws of the State of Washington, empowered to sue and be sued, and represented by and through its elected City Attorney, Peter S. Holmes.

42. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas.

43. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas.

44. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas.

45. Plaintiff Monterey County, California is a political subdivision of the State of California.

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46. Plaintiffs are aggrieved by Defendants' decision and conduct and have standing to bring this action because Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury unless and until the challenged decision and conduct are enjoined.

47. Defendant Donald J. Trump is the President of the United States. He is responsible for the actions and decisions that are being challenged by Plaintiffs in this action and is sued in his official capacity.

48. Defendant the United States Department of Commerce is a cabinet agency within the executive branch of the United States government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Census. 13 U.S.C. § 4.

49. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is responsible for overseeing the Census Bureau, conducting the decennial census of the population, and reporting to the President the tabulation of total population by States for the apportionment of Representatives in Congress. 13 U.S.C. § 141. He is sued in his official capacity.

50. Defendant Bureau of the Census is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for planning and administering the decennial census.

51. Defendant Steven Dillingham is Director of the Census Bureau. He is sued in his official capacity.

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ALLEGATIONS

I. Constitutional and statutory background.

A. The Constitution requires apportioning Members of the House of Representatives among the States based on the total number of persons living in each State.

52. The Constitution requires that the Members of the House of 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; *see id.* art. I, § 2, cl. 3.

53. The number of Representatives apportioned to each State, along with the two Senators given to each State, determines the allocation among the States of electors in the Electoral College. *Id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3.

54. To apportion Representatives among the States properly (and ultimately to allocate electors among the States properly) the Constitution requires an "actual Enumeration" of the total population every ten years, *id.* art. I, § 2, cl. 3.

55. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and to use that enumeration of the total population "to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019).

56. More than two hundred years of history, practice, and judicial and administrative precedents establish that the apportionment of Representatives must be based on *all persons living* in each State, regardless of their citizenship or immigration status.

57. During the country's founding, the Framers debated the proper basis on which to apportion Representatives and declared that Representatives "shall be apportioned among the

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several States which may be included within this Union, according to their *respective Numbers*." U.S. Const. art. I, § 2, cl. 3 (emphasis added). The Framers repeatedly made clear that the basis for apportionment of Representatives was thus all persons. For example, as James Madison explained in 1788, the "fundamental principle of the proposed constitution" ensured that "the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants." The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001).

58. The original Apportionment Clause provided for only two exceptions to the use of total population for apportionment. First, "Indians not taxed" were excluded from the apportionment base. U.S. Const. art. I, § 2, cl. 1, § 3. Second, slaves were counted as only three-fifth of a person. *Id.* No other exceptions were provided, making clear that all other persons living in the United States needed to be counted by the decennial enumeration and included in the apportionment base.

59. When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats among the States and reaffirmed that apportionment must be based on *all persons living* in each State—citizens and noncitizens alike. The Framers of the Fourteenth Amendment rejected numerous proposals to change the basis of apportionment from total population to voter population. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposal to apportion representatives among the States "according to their respective legal voters").

60. Instead, the Framers amended the Constitution to remove the provision that counted slaves as three-fifths of a person and declared that apportionment of Representatives must be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

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As the Fourteenth Amendment's Framers explained, "numbers," *i.e.*, all persons living in each State, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (Jacob Howard).

61. Basing apportionment on all persons, the Framers further emphasized, ensured that each State's representation in the House reflected all persons regardless of whether they could then vote, including women, children, and the "entire immigrant population not naturalized." *Id.* at 432 (Rep. John Bingham); *see, e.g.*, *id.* at 411 (representation based on number of voters improperly "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)).

62. Since 1790, in accordance with the Constitution's express requirement to base apportionment on all persons living in each State, the decennial actual enumeration has *always* counted all persons living in the United States based on where they "usually reside[]." *See* Census Act of 1790, § 5, 1 Stat. 101 (1790); *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg, 28,950, 28,950 (May 20, 2015) ("The Census Act of 1790 established the concept of 'usual residence' as the main principle in determining where people are to be counted. This concept has been followed in all subsequent censuses.").

63. Under the Census Bureau's well-settled practice and a final rule that it promulgated pursuant to notice-and-comment rulemaking for the 2020 Census, usual residence means the place where a person lives and sleeps most of the time. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

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64. Accordingly, the decennial enumeration and apportionment base includes all noncitizens who live and sleep most of the time in the United States, regardless of their place of citizenship or immigration status. *See, e.g.*, *id.* The enumeration likewise counts noncitizens who are "members of the diplomatic community" "at the embassy, consulate, United Nations' facility, or other residences where diplomats live." *Id.*

65. By contrast, noncitizens who are temporarily visiting the United States, such as on a vacation or business trip, are not included in the decennial enumeration and apportionment base because they do not live and sleep most of the time in the United States. *See, e.g.*, *id.*

66. The millions of undocumented immigrants who do live in the United States have an established presence here. These immigrants have moved to the United States, and they are members of their state and local communities.

67. For example, the Migration Policy Institute has estimated, based on data from 2012 to 2016, that more than nine million undocumented immigrants have lived in the United States for five years or more. The Migration Policy Institute estimated that more than seven million undocumented immigrants have lived in this country for ten years or more, and that nearly four million undocumented immigrants have lived here for twenty years or more.[1]

68. Undocumented immigrants residing here both contribute to and participate in their communities and in many public programs. For example, millions of undocumented immigrants

[1] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

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work here and pay taxes.[2] Many undocumented immigrants live here with their family members, including children who are United States citizens.[3]

69. Based on the Constitution's text, more than two centuries of history, and well-settled census practice, the Supreme Court and other courts have repeatedly made clear that the Fourteenth Amendment requires apportionment of Representatives based on the total number of all persons living in each State. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 10-18 (1964); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). Courts have also repeatedly determined that the "whole number of persons" used to apportion Representatives includes all noncitizens who are living in the United States regardless of their immigration status. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-78 (D.D.C. 1980) (three-judge court).

70. The federal government, and several of the Defendants here, have conceded that the decennial enumeration that constitutes the apportionment base must count all persons living in the United States.

71. For example, on March 14, 2019, Secretary Ross testified under oath during a congressional committee hearing, stating "The constitutional mandate, sir, for the census is to try

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[2] *See, e.g.*, Jens Manuel Krogstad et al., Pew Research Center, *5 facts about illegal immigration in the U.S.* (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s (estimating that in 2017, the United States' civilian workforce included 7.6 million undocumented immigrants); American Immigration Council, *Adding Up the Billions in Tax Dollars Paid by Undocumented Immigrants* 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/adding_up_the_billions_in_tax_dollars_paid_by_undocumented_immigrants.pdf; Hunter Hallman, Bipartisan Policy Center, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer* (Mar. 28, 2018), https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/.

[3] Migration Policy Institute, *supra* (estimating that more than 3 million undocumented immigrants over the age of 15 resided with a citizen child under the age of 18).

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to count *every person residing* in the U.S. at their place of residence on the dates when the census is conducted." *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019) (emphasis added). Secretary Ross further testified that "the Department of Commerce is fully committed to administering as complete and accurate decennial census as we can. We intend to try to *count every person* taking all necessary actions to do so." *Id.* (emphasis added).

72. During a congressional committee hearing in February 2020, Census Bureau Director Dillingham stated that the Bureau will "*count everyone*, wherever they are living," including undocumented immigrants. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (Feb. 12, 2020) (emphasis added).

73. The federal government has repeatedly argued that excluding undocumented immigrants from the decennial enumeration or the apportionment base violates the Constitution and applicable statutes. For example, in *Federation for American Immigration Reform v. Klutznick*, the government urged a district court to reject claims demanding exclusion of undocumented immigrants from the "whole number of persons" that constitutes the apportionment base. The government explained that "the plain language of the Constitution, as well as the intent of its framers, establishes that *all* inhabitants, including illegal aliens, must be enumerated for the purpose of apportioning Representatives."[4]

74. Similarly, the Department of Justice's Office of Legislative Affairs has opined that the Constitution requires inclusion of undocumented immigrants in the decennial

[4] Defs.' Mem. of Points & Authorities in Support of Mot. to Dismiss or for Summary Judgment, No. 79-3269 (D.D.C.), *reprinted in 1980 Census: Counting Illegal Aliens, Hr'gs Before the S. Subcomm. on Energy, Nuclear Proliferation and Federal Services*, 96th Cong. 125-156 (1980).

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enumeration that constitutes the apportionment base. *See, e.g.*, Letter from Carol T. Crawford, Assistant Attorney General, to Senator Jeff Bingham (Sept. 22, 1989).

75. The population count derived from the census is used not only to apportion representatives and ultimately electors "but also to allocate federal funds to the States and to draw electoral districts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

76. For these reasons, the "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997).

B. The Census Act requires that the total population count used for congressional apportionment include all persons living in the United States.

77. The Constitution provides that an "actual Enumeration shall be made" every ten years "in such manner as [Congress] shall direct by law." U.S. Const. art. I, § 2. Congress has exercised its authority over the census by enacting various statutory provisions ("Census Act").

78. Congress has assigned the responsibility of conducting the decennial enumeration to the Secretary of Commerce, and the Secretary may delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141.

79. The Census Act requires that the decennial census be taken on April 1, 2020, the "decennial census date." 13 U.S.C. § 141(a). The Secretary of Commerce has no discretion to delay the decennial census date under the Census Act. *Id.*

80. Within nine months of the decennial census date, *i.e.*, by January 1, 2021, the Secretary of Commerce must report to the President "[t]he tabulation of total population by States" that is "required for the apportionment of Representatives in Congress among the several States." *Id.* § 141(b).

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81. Then, between January 3 and January 8, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a(a).

82. Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives must transmit "to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

II. Defendants' unlawful attempt to add a citizenship question to the decennial census.

83. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are directly related to Secretary Ross's earlier and unlawful attempt to alter the decennial census that provides the apportionment count by adding a question inquiring about citizenship status.

84. On March 26, 2018, Secretary Ross directed the Census Bureau to use the 2020 Census to demand information on the citizenship status of every resident in the country.[5] Secretary Ross stated that he had decided to add the citizenship question because doing so was "necessary to provide complete and accurate data" that would aid enforcement of the Voting Rights Act (VRA) by the Department of Justice.

[5] Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 7 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files" /2018-03-26_2.pdf.

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85. Many of the plaintiffs here filed a lawsuit challenging the addition of the citizenship question as, among other things, arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* Second Am. Compl., *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 210 (S.D.N.Y. filed July 23, 2018).

86. After an eight-day bench trial, the United States District Court for the Southern District of New York vacated Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire. *New York*, 351 F. Supp. 3d at 679. In so ruling, the court concluded that the plaintiffs had standing to sue because the inclusion of a citizenship question would deter participation in the census by households with a noncitizen and lead to a differential undercount of noncitizens and Hispanics that would concretely harm plaintiffs in various ways. *Id.* at 578-593. For example, the court found that adding a citizenship question would cause some plaintiffs to lose congressional seats, impair state and local redistricting efforts that rely on census numbers, harm the quality and accuracy of census data, and reduce federal funding to plaintiffs' jurisdictions. *Id.* at 593-98, 607-15.

87. The court also determined that Secretary Ross's decision violated the Administrative Procedure Act for several reasons, including because his rationale for adding the citizenship question was pretextual. *Id.* at 660-64. As the court explained, the evidence was "clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision [to add the citizenship question] was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Id.* at 660. The court noted that it was "unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were." *Id.* at 569-70.

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88. The Supreme Court granted certiorari before judgment and affirmed, in relevant part, the district court's final judgment setting aside the Secretary's decision to add a citizenship question. The Supreme Court held that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Dep't of Commerce*, 139 S. Ct. at 2573. The Court reasoned that the Secretary's decision "cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA" because there was "a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. In short, Secretary Ross's "VRA enforcement rationale—the sole stated reason—seems to have been contrived." *Id.*

89. After the Supreme Court remanded the case to the district court, the court entered a permanent injunction that enjoined the defendants "from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census." Order, *New York v. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 634 (S.D.N.Y. July 16, 2019).

90. On July 11, 2019, President Trump issued an Executive Order to "ensure that accurate citizenship data is compiled in connection with the census" notwithstanding the Supreme Court's decision and the district court's order precluding the use of a citizenship question in the 2020 Census. *Collecting Information About Citizenship Status in Connection with the Decennial Census*, Exec. Order 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019).

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91. To achieve that goal, President Trump directed all executive departments and agencies to provide to the Department of Commerce "the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country." *Id.*

92. In a public statement accompanying the issuance of the Executive Order, given from the White House's Rose Garden, President Trump made clear that the federal government would not be "backing down on our effort to determine the citizenship status of the United States population." President Donald Trump, *Remarks by President Trump on Citizenship and the Census* (July 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/. President Trump stated that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States.' Now they're trying to erase the very existence of a very important word and a very important thing: citizenship." *Id.*

93. President Trump further stated that, pursuant to the Executive Order, the federal government will be taking steps "to ensure that citizenship is counted so that we know how many citizens we have in the United States." *Id.*

III. The July 21, 2020 Memorandum directing exclusion of undocumented immigrants from the apportionment count.

94. Recent events have now laid bare the real reasons driving Secretary Ross's decision to add a citizenship question to the 2020 Census: to exclude undocumented persons from the "whole number of persons" that constitutes the apportionment base and to discriminate against Hispanics and noncitizens.

95. On July 21, 2020, President Trump issued a memorandum (i) declaring that undocumented immigrants will be excluded from the "whole number of persons in each State" enumerated by the 2020 Census and used to apportion the number of Representatives to each State, and (ii) directing the Secretary to take "all appropriate action" to provide the President

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with information to exclude undocumented immigrants from the apportionment base. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1).

96. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 Census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible." *Id.* at 44,680.

97. The Memorandum asserts that the Executive branch has purported "discretion" to exclude from the apportionment base all undocumented immigrants who reside in the United States, *id.* at 44,679—no matter how long they have been living here.

98. The Memorandum acknowledges that the Constitution explicitly requires apportionment of Representatives based on the "whole number of persons in each State." *Id.* It states that not every person who is physically present on the decennial census date is living in the United States. *Id.* For example, the Memorandum states, noncitizens who are temporarily visiting on vacation or for business are not "inhabitants" of the United States and are thus not included in the apportionment base. *Id.* Without any plausible basis, the Memorandum then asserts that purported "discretion delegated to the executive branch to determine who qualifies as an 'inhabitant' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status"—even if those persons have been living in the United States for many years. *Id.*

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99. In the Memorandum, President Trump targets States (including some of the plaintiff States) that have many undocumented immigrants living in their jurisdictions or that have declined to affirmatively assist the federal government's immigration enforcement efforts.

100. For example, President Trump stated that "[a]ffording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* at 44,680. The Memorandum further stated that States that decline to adopt state laws or policies to assist federal efforts to enforce the immigration laws passed by Congress should essentially be stripped of any "representation in the House of Representatives" that is based on undocumented immigrants living in their jurisdictions. *Id.*

101. The Memorandum requires Secretary Ross, in preparing his § 141(b) report of the actual enumeration on which apportionment must be based, to take actions "to provide information" to the President to exclude undocumented immigrants from apportionment. *Id.* The Memorandum thus directs the Secretary (and by extension the Commerce Department and Census Bureau) to take actions to enable the President to exclude undocumented immigrants from his § 2a(a) report of both the "whole number of persons in each State" and the corresponding number of Representatives that each State receives. *Id.*

102. On the same day that he issued the Memorandum, President Trump issued a public statement making clear that Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are a continuation of the federal government's prior unlawful attempt to add a citizenship question to the 2020 Census. President Donald Trump,

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Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

103. As President Trump's statement explained, he had previously asserted during his Rose Garden statements in July 2019 that he "would not back down in [his] effort to determine the citizenship status of the United States population." *Id.* He further explained that he was now following "through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." *Id.* Echoing his earlier statements about the citizenship question, Trump further asserted that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States'" and that "the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country." *Id.* He stated that his Memorandum directing exclusion of undocumented immigrants from the apportionment base responds to a purported "broader left-wing effort to erode the rights of Americans citizens." *Id.*

104. Upon information and belief, following receipt of the Memorandum, the Secretary or Department of Commerce has issued (or will imminently issue) directives to the Census Bureau, constituting final agency action, to implement President Trump's directive to exclude noncitizens from the enumeration and apportionment base.

IV. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color.

105. The Memorandum explicitly states that its goal is to reduce political influence and congressional representation to jurisdictions with a larger share of undocumented immigrants. 85 Fed. Reg. at 44,680.

106. President Trump has repeatedly articulated concerns about the growth of immigrant communities and the impact of that growth on political power, and has sought to

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minimize the power of Hispanic and immigrant communities to increase the power of non-Hispanic whites.

107. During the 2016 presidential campaign, for example, President Trump tweeted: "How crazy—7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[6]

108. On April 5, 2018, when discussing his opposition to family-based immigration systems, President Trump claimed that Democrats favor "chain migration" because the party believes the immigrants will "vote Democratic." Three weeks later, on April 28, President Trump revisited this topic, stating that Democrats favor undocumented immigration because "all of these people that are pouring across are going to vote for Democrats, they're not going to vote for Republicans."[7]

109. Defendants' exclusion of undocumented immigrants from the apportionment base is of a piece with President Trump's anti-immigrant and anti-Hispanic rhetoric and his Administration's targeting of immigrant and Hispanic communities, which reflect animus towards those groups.

110. President Trump has long engaged in rhetoric that disparages Hispanics and immigrants of color. In statements stretching back to the beginning of his campaign, President Trump has repeatedly dehumanized, devalued, and vilified immigrants in general, and specifically immigrants from Latin America. For instance:

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[6] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[7] Fox News (@FoxNews), Twitter (Apr. 28, 2018), https://twitter.com/foxnews/status/990383288232620032.

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a. During his campaign launch in June 2015, President Trump claimed that "[w]hen Mexico sends its people. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from more than Mexico. It's coming from all over South and Latin America."[8]

b. During a meeting about recent immigrants in the Oval Office in June 2017, President Trump stated that 15,000 immigrants from Haiti "all have AIDS" and that 40,000 immigrants from Nigeria would never "go back to their huts" in Africa after seeing the United States.[9]

c. During a January 2018 meeting with lawmakers, while discussing protections for immigrants from Haiti, El Salvador and other African countries, President Trump asked why the United States is "having all these people from shithole countries come here" and suggested that the United States should have more immigrants from countries like Norway.[10]

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[8] *Full text: Donald Trump announces a presidential bid*, Wash. Post, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

[9] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[10] Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as 'shithole' countries*, Jan. 12, 2018, https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946.

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d. In a May 16, 2018 speech, President Trump stated that "[w]e have people coming into the country, or trying to come in . . . . You wouldn't believe how bad these people are. These aren't people, these are animals."[11]

e. Speaking on the topic of migrant groups travelling to the United States from Central America at a rally on May 8, 2019, President Trump, stated, "[W]hen you see these caravans starting out with 20,000 people, that's an invasion."[12]

111. President Trump has acted on this rhetoric by adopting policies that seek to isolate, exclude, and instill fear in Hispanic immigrants and other immigrants of color. For instance, the Trump Administration has:

a. Attempted to rescind the Deferred Action for Childhood Arrivals program, which protected 800,000 individuals, 90% of whom were Hispanic and 80% of whom were Mexican-American;

b. Banned travel from several majority-Muslim countries;

c. Suspended refugee admissions to the United States;

d. Terminated special protections from removal for migrants from nations experiencing war and natural disasters, including Nicaragua, Honduras, Haiti and El Salvador;

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[11] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[12] *President Trump Holds Rally in Panama City Beach, Florida*, C-SPAN (May 8, 2019) (video), https://www.c-span.org/video/?460412-1/president-trump-holds-rally-panama-city-beach-florida.

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e. Increased actual and threatened raids and deportations of undocumented migrants, including, as recently as June 17, 2019, when President Trump tweeted a threat that "[n]ext week ICE will begin the process of removing the millions of illegal aliens who have illicitly found their way into the United States. They will be removed as fast as they come in";[13]

f. Attempted to build a physical wall along the Mexico-U.S. border;

g. Adopted policies of separating children from their families when entering the United States from Mexico, and detaining children separate from their parents and families thereafter; and

h. Maintained children and other migrants across the U.S.-Mexico border in detention facilities that the United Nations Children's Fund has described as "dire" and as causing "irreparable harm" to children housed in them.[14]

112. These public statements and actions from Defendant Trump establish that the rationale for excluding undocumented immigrants from the apportionment base is motivated by racial animus against immigrants of color, and a desire to curb the political power of immigrant communities of color.

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[13] Nick Miroff & Maria Sacchetti, *Trump vows mass immigration arrests, removals of 'millions of illegal aliens' starting next week*, Wash. Post, June 17, 2019, https://www.washingtonpost.com/immigration/trump-vows-mass-immigration-arrests-removals-of-millions-of-illegal-aliens-starting-next-week/2019/06/17/4e366f5e-916d-11e9-aadb-74e6b2b46f6a_story.html?utm_term=.ece5e6a6b7e6.

[14] *After Rio Grande tragedy, UNICEF chief highlights "dire" detention centres on US-Mexico border*, UN News (June 27, 2019), https://news.un.org/en/story/2019/06/1041421.

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V. Plaintiffs are harmed by Defendants' decision to exclude undocumented immigrants from the apportionment base.

113. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests because they will cause some Plaintiffs to lose congressional seats and decrease their share of presidential electors in the Electoral College; skew the division of electoral districts within Plaintiffs' jurisdictions by impairing state and local redistricting efforts that rely on the census count; reduce federal funds to Plaintiffs' jurisdictions by deterring immigrants from responding to the decennial census that is currently underway; and degrade the quality of census data that Plaintiffs rely on to perform critical governmental functions.

114. First, excluding undocumented immigrants from the apportionment count will likely cause several States to lose one or more Representatives in Congress, directly harming those Plaintiff States, as well as those Plaintiff counties and cities within affected States, by diluting their political power and undermining their interest in fair congressional representation.

115. For example, large numbers of undocumented immigrants reside in California, Texas, New York, New Jersey, and Illinois.[15] Defendants' decision to exclude undocumented immigrants from the apportionment count is likely to directly reduce representation for those jurisdictions in Congress, injuring the representational interests of Plaintiffs the State of New York, State of New Jersey, State of Illinois, City of Chicago, City of New York, City and County of San Francisco, Cameron County, El Paso County, Hidalgo County, and Monterey County.

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[15] Pew Research Center, November 27, 2018, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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Other Plaintiffs may also suffer direct representational harms if undocumented individuals are excluded from the apportionment count.

116. The Memorandum itself acknowledges and intends these harms. *See* 85 Fed. Reg. at 44,680 (recognizing that excluding undocumented immigrants will "result in the allocation" of fewer congressional seats "than would otherwise be allocated" to some states).

117. The loss of a congressional seat will also cause the affected Plaintiff States, counties, and cities to lose one or more votes in the Electoral College, impairing their ability to elect the President and Vice President and harming their political power.

118. Second, excluding undocumented immigrants from the apportionment base will harm Plaintiffs' representational interests by directly impairing Plaintiffs' ability to draw accurate districting lines for congressional, state, or local legislative districts.

119. To comply with the Fourteenth Amendment's one-person, one-vote requirement, States must use total population as the population base for congressional redistricting. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"); *see Evenwel*, 136 S. Ct. at 1129. Defendants' decision to exclude undocumented immigrants from the apportionment base will undermine Plaintiff States' ability to comply with this Constitutional mandate.

120. Certain Plaintiffs are required by state constitutional or statutory provisions to use the total population count from the decennial census as the basis for redistricting within their jurisdictions. New York state law provides, for example, that "each federal census taken decennially . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of

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senate and assembly districts." N.Y. Const. art. III, § 4(a); *see also id.* §§ 3-5, 5-a. Many of the other Plaintiffs have comparable laws.[16]

121. Third, excluding undocumented immigrants from the apportionment base will deprive Plaintiffs of critical federal funding and inflict substantial financial harms on Plaintiffs.

122. Political science literature establishes that States that lose seats in Congress typically see a decrease in their share of federal outlays in subsequent years due to the reduction in their voting power in Congress. *See, e.g.*, Roy Elis, Neil Malhotra, & Marc Meredith, *Apportionment Cycles as Natural Experiments*, Political Analysis 358-76 (2009). Those Plaintiffs likely to lose representation in Congress therefore also stand to lose critical federal resources as a result.

123. All Plaintiffs will further suffer financial harm because Defendants' decision to exclude undocumented immigrants from the apportionment base will deter participation in the ongoing decennial census, undermining the Census Bureau's efforts to count immigrants and their families, and depriving Plaintiffs of their fair share of census-derived federal funds.

124. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants.[17] Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. These

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[16] *See, e.g.*, Chicago Municipal code § 2-8-300; D.C. Code § 1-1011.01; Mass. Const. Amend. art. CI, §§ 1, 2, arts. CIX, CXVII, CXIX; Nev. Const. art. IV, § 5, art. XV, § 13; Tex. Const. art. 3, § 26; Va. Code Ann. § 30-265; Vt. Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902; Wash. Const. art. II, § 43; Wash. Rev. Code §§ 29A.76.010, 44.05.090.

[17] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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households are already less likely to respond to the census questionnaire; this Administration's ongoing efforts to target immigrants—including Defendants' failed efforts to add a citizenship question to the decennial census—have engendered substantial fear within these communities.[18]

125. The COVID-19 pandemic has further hampered efforts to ensure that all people—including hard-to-count populations—are counted. For example, the census relies upon non-response follow up operations (NRFU) to contact potential respondents and increase the census response rate. But NRFU operations were suspended and delayed during the pandemic, and the Government Accountability Office has raised concerns that even when resumed, these efforts will be less effective in light of the virus.[19]

126. Defendants' decision to exclude undocumented immigrants from the apportionment base was announced just weeks before Census Bureau enumerators were finally scheduled to go into the field to encourage households to respond to the census,[20] creating confusion and further increasing the risk of an undercount.

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[18] *See, e.g.*, Alexandra Schmidt, *Citizenship question is gone. Michigan immigrants still distrust the Census*, (Mar. 2, 2020), https://www.bridgemi.com/michigan-government/citizenship-question-gone-michigan-immigrants-still-distrust-census (noting ongoing "fear among immigrants about what the government will do with information collected in the count").

[19] *See* U.S. Government Accountability Office, *2020 Census: COVID-19 Presents Delays and Risks to Census Count* https://www.gao.gov/products/GAO-20-551R#summary.

[20] U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19*, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited July 24, 2020).

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127. The announcement of Defendants' decision was intended to promote fear and deter participation in the census by immigrants and their families, including through the President's remarks that he "will not stand" for efforts to "conceal the number" of immigrants.[21]

128. The Census Bureau has repeatedly emphasized that "[e]veryone counts," citizens and noncitizens alike.[22] But Defendants' decision and actions to exclude undocumented immigrants from the apportionment base do the opposite. Excluding undocumented immigrants from the apportionment count communicates to immigrants that their census responses are less valuable and less important than those of citizens.

129. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. At least 320 federal domestic financial assistance programs rely on census data to allocate money; in fiscal year 2016, these programs "allocated about $900 billion using census-derived data." *New York*, 351 F. Supp. 3d at 596. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. The reduction in census participation caused by Defendants' announcement that they will exclude undocumented immigrants from the apportionment base will harm Plaintiffs by depriving them of their statutory fair share of federal funding and removing crucial resources for important government services.

130. Finally, by deterring immigrants and their families from responding to the decennial census, Defendants' decision to exclude undocumented immigrations from the apportionment base will degrade the quality of census data. As census self-response rates

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[21] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

[22] *See, e.g.*, Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html.

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decline, the quality of the data—including information relating to population subgroups and their characteristics—worsens. But Plaintiffs "rely on accurate data to perform essential governmental functions," including to draw school zones, deploy health care resources, and make infrastructure decisions. *Id.* at 600. Defendants' decision will therefore undermine Plaintiffs' interests in using accurate census data to perform critical governmental functions.

VI. Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants.

131. Defendants cannot reliably exclude undocumented immigrants from the apportionment count. Just months ago, the Federal Government represented in separate litigation that there is a "lack of accurate estimates of the resident undocumented population" on a state-by-state basis.[23]

132. Although a previous executive order suggests that the Census Bureau may rely on administrative records to identify *noncitizens*, *see* 84 Fed. Reg. at 33,821, many noncitizens are lawfully present; and administrative records cannot provide sufficiently reliable or accurate information about whether noncitizens are *undocumented*, particularly for actual enumeration and apportionment purposes. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[24] The limited administrative records available with respect to undocumented immigrants are incomplete, outdated, and often inaccurate.

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[23] Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. Mar. 13, 2020).

[24] John L. Czajka, *Can Administrative Records Be Used to Reduce Nonresponse Bias?*, 645 Annals Am. Acad. Pol. & Social Sci. 171, 175 (2013).

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133. For example, the Department of Homeland Security (DHS) recently acknowledged that determining immigration status from their records is "challenging," given the "the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system."[25] DHS has acknowledged that time lags between collecting and reporting data mean that "data accuracy issues may arise."[26] Even when used in combination, existing administrative records are inadequate to ascertain reliably whether individuals are undocumented.

134. Although the federal government has already suggested that they may resort to "statistical modeling" to estimate the undocumented population in furtherance of the Presidential Memorandum, the Census Bureau has not yet "formulated a methodology,"[27] and Defendants have not articulated how such statistical modeling will comport with their constitutional obligation to conduct an "actual Enumeration." U.S. Const. art. 1, § 2, cl. 3.

135. Despite Defendants' failure to identify any reliable method to accurately enumerate the population of undocumented immigrants, Defendants have already decided to report that population to the President and to exclude that population from the tabulation of total population reported to Congress. Defendants' commitment to proceeding on this course of action without regard to the unreliability or inaccuracy of their underlying enumeration demonstrates that they have prejudged the decision, violates their statutory obligations to report

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[25] Department of Homeland Security, *Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau*, 2, 11 (Dec. 20, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf.

[26] *Id.* at 6.

[27] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985.

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total population, and confirms the irrational and arbitrary nature of their decision and actions to exclude undocumented immigrants from the actual enumeration and apportionment base.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(U.S. Constitution article I, section 2, clause 3; U.S. Constitution amend. XIV, sec. 2)

136. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

137. The Constitution requires that "Representatives shall 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; *see id.* art. I, § 2, cl. 3.

138. Undocumented immigrants are persons. *Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

139. Defendants' decision to exclude undocumented immigrants from the apportionment base for the purpose of reapportionment of Representatives following the 2020 Census, as well as any action they take to implement or further that decision, violates the constitutional command to apportion Representatives "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

140. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF

(U.S. Constitution amend. V—Due Process Clause)

141. Plaintiff States incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

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142. Under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal government cannot deny to any person the equal protection of its laws. The Due Process Clause specifically prohibits the federal government from discriminating against individuals on the basis of race, ethnicity, and national origin. U.S. Const. amend. V.

143. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color. This animus is reflected in Defendants' repeated statements vilifying these communities.

144. The highly unusual chronology of events, sharp departure from centuries of past practice, articulation of a pretextual reason for Defendants' now-enjoined efforts to demand citizenship information on the decennial census questionnaire, and disproportionate burden of Defendants' decision on Hispanics and immigrant communities of color further indicate that Defendants' decision is motivated by unconstitutional discriminatory purpose.

145. By excluding undocumented immigrants from the apportionment base, Defendants intend to reduce political power, influence, and funding resources among Hispanic and immigrant communities as compared to non-Hispanic whites.

146. Defendants' violation causes ongoing harm to Plaintiff States and their residents.

THIRD CLAIM FOR RELIEF

(U.S. Constitution amend. X)

147. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

148. The Tenth Amendment prohibits the federal government from coercing states and localities to legislate or promote policies that capitulate to federal interests.

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149. Defendants' decision to exclude undocumented immigrants from the apportionment count punishes Plaintiffs for refusing to assist in the enforcement of federal immigration law, in an attempt to coerce Plaintiffs to change their policies. 85 Fed. Reg. at 44,680.

150. The Tenth Amendment requires the federal government to respect the equal sovereignty of the sovereign states.

151. Without adequate justification, Defendants' decision to exclude undocumented immigrants from the apportionment count impermissibly targets certain states for unfavorable treatment because of their refusal to assist in the enforcement of federal immigration law. 85 Fed. Reg. at 44,680.

152. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

FOURTH CLAIM FOR RELIEF

(Administrative Procedure Act, 5 U.S.C. § 706)

153. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

154. The Administrative Procedure Act provides that the Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

155. Defendants' decision to exclude undocumented immigrants from the apportionment base, as well as any action they take to implement or further that decision, is arbitrary and capricious because it is contrary to the evidence before the agency and fails to consider important aspects of the problem, including that Defendants lack data reliably to exclude undocumented immigrants from the apportionment base.

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156. Defendants' decision and any implementing actions they undertake are also not in accordance with law because the Census Act requires the Secretary to tabulate and report to the President a tabulation of "total population by States . . . as required for apportionment of Representatives in Congress." 13 U.S.C. § 141(b).

157. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census, as well as any action they take to implement or further that decision, is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census is intentionally discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment;

3. Declare that Defendants' decision and any implementing actions they take are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

4. Enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy;

5. Issue an order holding unlawful, vacating, and setting aside the decision to exclude undocumented immigrants from the apportionment base, as well as any action taken to implement or further that decision;

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6. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report to the President the total population by States under 13 U.S.C § 141(b) based solely on the total number of persons in each State, including undocumented immigrants, without providing any information about the number of undocumented immigrants in each State.

7. Issue a writ of mandamus compelling the President to transmit to Congress pursuant to 2 U.S.C. § 2a(a) a statement of the whole number of persons in each State, and 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, based on the total number of residents of each state, including undocumented immigrants.

8. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and

9. Grant such other and further relief as the Court deems just and proper.

DATED: July 24, 2020

Respectfully submitted,

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* Application for *pro hac vice* admission forthcoming

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Exhibit 1

Federal Register
Vol. 85, No. 142
Thursday, July 23, 2020

Presidential Documents

Title 3—

The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the ''whole number of persons in each State,'' which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is ''the President's personal transmittal of the report to Congress'' that ''settles the apportionment'' of Representatives among the States, and the President's discretion to settle the apportionment is more than ''ceremonial or ministerial'' and is essential ''to the integrity of the process'' (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the ''persons in each State, excluding Indians not taxed,'' to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term ''persons in each State'' has been interpreted to mean that only the ''inhabitants'' of each State should be included. Determining which persons should be considered ''inhabitants'' for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are ''persons'' who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically ''in'' a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an ''inhabitant'' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

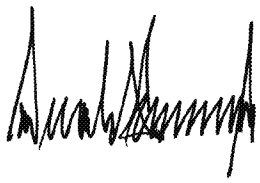
Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
Washington, July 21, 2020

[FR Doc. 2020–16216
Filed 7–22–20; 2:00 pm]
Billing code 3510–07–P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC. Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau, Defendants.	Civil Action No.

COMPLAINT

1. This action challenges President Trump's lawless attempt to exclude undocumented immigrants from the "persons" who must be counted in the Census for purposes of apportioning congressional seats to states. This xenophobic effort to deny the basic humanity of undocumented immigrants violates Article I's mandate to count all "persons" in the Census, and the Fourteenth Amendment's requirement that

"Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State . . . ." (emphasis added). These words leave no room for doubt: they expressly mandate counting "the whole number of persons" living in the United States for purposes of congressional apportionment. As the Supreme Court held just four years ago, "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including all non-citizens living in the United States, regardless of legal status. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016).

2. Despite this exceedingly clear constitutional command and binding Supreme Court precedent, on July 21, 2020, Defendant Trump issued a Presidential Memorandum addressed to Defendant Commerce Secretary Wilbur Ross titled, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). The Memorandum purports to declare—for the first time in our nation's history—that it is "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.)." In other words, the Memorandum directs Secretary Ross: do not count undocumented immigrants at all for purposes of congressional apportionment.[1]

[1] The Memorandum appears to potentially exclude both those with no form of status whatsoever as well as those currently authorized to remain and work in the U.S., such as holders of Deferred Action for Childhood Arrivals, who are nonetheless not "in lawful status under the Immigration and Nationality Act." See *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 487 (9th Cir. 2018) ("recipients of deferred action enjoy no formal immigration status") (quotations omitted), *rev'd in part, vacated in part sub nom Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412

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3. Rarely does any government actor, much less the President of the United States, so openly and obviously violate the Constitution. The Fourteenth Amendment mandates "counting the whole number of persons" for congressional apportionment. As the Supreme Court reaffirmed nearly four decades ago, an undocumented individual living in the United States "is surely 'a person' in any ordinary sense of that term," "[w]hatever his status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The President cannot change the fact that undocumented individuals are human beings.

4. The new "policy" also breaks an uninterrupted line of history: every Decennial Census in our nation's history has included every person who lives in the United States, regardless of citizenship or immigration status, for purposes of apportioning congressional representation. Defendant Trump's new policy set forth in the Memorandum therefore not only violates the plain and unequivocal text of Section 2 of the Fourteenth Amendment and related Supreme Court precedent, it also departs from hundreds of years of consistent Census practice.

5. In addition to contravening the plain text of the Constitution, Supreme Court precedent, and an unbroken line of historical practice, the policy conflicts with the Department of Justice's own longstanding position—asserted repeatedly over decades in litigation in courts around this country, including to this Court in 2018—that undocumented immigrants are "persons" who must be counted in the Decennial Census

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(E.D.N.Y. 2018) ("Deferred action does not . . . confer lawful immigration status"), *vacated and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). For the sake of consistency, Plaintiffs refer to all those excluded here as "undocumented."

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and apportionment calculations. The Administration's own lawyers have made clear that the policy is unconstitutional.

6. The new policy is a discriminatory attack on immigrants and immigrant communities, and particularly immigrant communities of color. It is intended to erase these individuals and communities, and to send the message that they do not count. Indeed, whereas the original Apportionment Clause in Article I, Section 2 infamously discounted enslaved Black Americans as three-fifths of a person for purposes of congressional apportionment, the Memorandum raises this numerical dehumanization to a new level: not three-fifths, but zero.

7. In practical terms, the policy will result in states such as California, Texas, and New York receiving fewer congressional districts and Electoral College votes, diluting the political power of the residents of these states. The policy will also deplete federal resources from states and localities with substantial immigrant populations. The policy is rank discrimination on the basis of national origin, race, and ethnicity in violation of the Equal Protection and Due Process guarantees of the Fifth Amendment.

8. The effects of the new policy will cascade beyond the exclusion of undocumented immigrants from the Census count. It is no coincidence that the Memorandum was unveiled shortly before the Census Bureau was scheduled to commence non-response follow up ("NRFU") field operations to identify persons who have not yet responded to the Census. The new policy of excluding undocumented immigrants from the Census conveys a xenophobic message aimed at suppressing Census participation from households containing immigrants and noncitizens. Unless enjoined, the policy undoubtedly will undermine the effectiveness of the Census Bureau's

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operations and deter members of immigrant communities—including undocumented immigrants, noncitizen immigrants with legal status, and United States citizens—from participating in the Census.

9. The new policy also violates a panoply of other constitutional and statutory prohibitions, including constitutional separation of powers, the Census Act, and the Administrative Procedure Act.

10. This is not Defendant Trump's first attempt to weaponize the Census to attack immigrant communities. Last year, the Supreme Court affirmed that the administration's effort to add a citizenship question to the 2020 Decennial Census would reduce Census responses among non-citizen households, and held that Defendant Ross's publicly-stated rationale—purportedly to help enforce the Voting Rights Act—was "contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66, 2575 (2019).

11. In issuing the Memorandum, Defendant Trump has now confessed the real reason behind that failed effort: to delete undocumented immigrants from the decennial enumeration altogether, and to exclude them categorically from the very concept of *personhood* in the Constitution. Among its many cynical motivations, the President's new policy is an obvious attempt to evade the consequences of the Supreme Court's decision and the permanent injunction issued by the district court in the citizenship question litigation. *See Dep't of Commerce*, 139 S. Ct. 2551; Order, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 634 (S.D.N.Y. July 16, 2019).

12. Plaintiffs therefore request declaratory, injunctive, and/or mandamus relief to prohibit Defendants from excluding undocumented immigrants from the population count used to apportion the House of Representatives.

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JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346(a), and 28 U.S.C. § 1361.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(e).

15. This Court has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

PARTIES

A. Plaintiffs

1. The New York Immigration Coalition

16. The New York Immigration Coalition ("NYIC") is an umbrella policy and advocacy organization for more than 200 groups in New York State, representing the collective interests of New York's diverse immigrant communities and organizations. It has its principal place of business at 131 West 33rd St, New York, NY 10001.

17. NYIC's mission is to unite immigrants, members, and allies so that all New Yorkers can thrive. It envisions a New York State that is stronger because all people are welcome, treated fairly, and given the chance to pursue their dreams. NYIC pursues solutions to advance the interests of New York's diverse immigrant communities and advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups. It seeks to build the power of immigrants and the organizations that serve them to ensure their sustainability, improve people's lives, and strengthen New York State.

18. NYIC's 200-plus members are dues-paying, 501(c)(3), nonprofit organizations that are committed to advancing work on immigrant justice, empowerment,

and integration. NYIC's members are located throughout New York State and beyond. These member groups include grassroots community groups, social services providers, large-scale labor and academic institutions, and organizations working in economic, social, and racial justice. A number of NYIC's member organizations receive funding from a variety of local, state, and federal government sources to carry out social service, health, and education programs. Many of these organizations receive governmental funding that is directly tied to the Decennial Census.

19. New York is likely to lose at least one House seat during the post-2020 Decennial Census apportionment process as a result of the exclusion of undocumented immigrants from the apportionment base. NYIC member organizations will lose political power because of New York's loss of at least one seat in the House of Representatives.

20. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure a number of NYIC's member organizations that receive funding to carry out social service, health, and education programs in these areas.

21. As an organization, NYIC has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, NYIC has and will continue to invest resources in Get Out the Count efforts through robust advocacy, outreach, and mass educational forums.

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22. The Census is ongoing, with the Census Bureau's NRFU just getting started.[2] NYIC plans to continue its Get Out the Count efforts during this NRFU. In its extensive Decennial Census outreach, NYIC will now face a much more difficult environment due to the perception among New York undocumented immigrants that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

23. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, NYIC will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to NYIC's Get Out the Count efforts will be diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, NYIC has already, and will continue to, divert resources from its other organizational priorities, including its work on health care

[2] U.S. Census Bureau, *2020 Census: Nonresponse Followup*, https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html (June 19, 2020).

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and language access issues, to address these concerns about decreased Census participation.

2. Make the Road New York

24. Plaintiff Make the Road New York ("Make the Road New York") is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains.

25. Make the Road New York's mission is to build the power of immigrant and working-class communities to achieve dignity and justice. To achieve this mission, they engage in four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation.

26. Make the Road New York has more than 22,000 members who reside in New York City, Long Island and Westchester County. These members lead multiple organizing committees across numerous issues and program areas of concern to the organization. Members take on leadership roles in the campaigns, determine priorities, and elect the representatives who comprise most of the Board of Directors.

27. The apportionment resulting from the exclusion of undocumented immigrants from the apportionment base will likely deprive New York of at least one seat in the House of Representatives, diminishing the political and voting power and influence, and thus injuring, Make the Road members who live in New York.

28. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

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29. Make the Road New York members include individuals who do not have lawful immigration status and as a result of the Memorandum will not be counted for apportionment of Congressional seats. Make the Road New York members also reside in states and localities where immigrant communities of color constitute significant portions of the population, including New York City and suburban areas outside of New York City. Its members in these jurisdictions rely on a number of government services whose funding is allocated based on population and demographics determined by the Decennial Census. This includes parents with children enrolled in Title I schools, and drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

30. Make the Road New York members will be deprived of funding to which they would be entitled by a more complete Census count.

31. One of the many Make the Road members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Perla Liberato. Ms. Liberato is a resident of Queens County, NY, where she works as a Youth Organizer. Because Ms. Liberato resides in New York State, she will lose political power because of her state's loss of representation in Congress.

32. Another Make the Road member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Yatziri Tovar. Ms. Tovar is a resident of Bronx County, NY, and works as a media specialist. Because Ms. Tovar resides in New York State, she will lose political power because of her state's loss of representation in Congress.

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33. Make the Road New York has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. For the 2020 Decennial Census, Make the Road New York is engaged in outreach and education work and receiving outside funding to help support this work. This work includes, among other things, general education programs, workshops for members, and person-to-person outreach. Make the Road New York's Census outreach efforts have already contacted over 100,000 people and assisted over 7,500 people with completing the Census questionnaire.

34. Make the Road New York will now face a much more difficult environment due to its constituents' heightened fear of interacting with government workers, which will be increased by anti-immigrant actions such as the decision to exclude undocumented immigrants from the apportionment base. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

35. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, Make the Road New York will be forced to expend more resources on their Decennial Census outreach efforts to reduce the effect of this policy change on the response rate in the immigrant communities of color it serves.

36. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision

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to exclude undocumented immigrants from the apportionment base, Make the Road New York will need to divert resources from other areas critical to its mission including civic engagement and providing legal services.

3. CASA

37. Plaintiff CASA is a nonprofit membership organization headquartered in Langley Park, Maryland. It has offices in Maryland, Virginia and Pennsylvania. CASA is the largest membership-based immigrants' rights organization in the mid-Atlantic region, with more than 90,000 members.

38. CASA's mission is to create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment, and legal services to immigrant communities. CASA serves nearly 20,000 people a year through its offices and provides support to additional clients over the phone and through email.

39. CASA as an organization receives governmental funding that is directly tied to the Decennial Census. Among other things, CASA receives Community Development Block Grant (CDBG) funds that are allocated based on population and demographics determined by the Decennial Census, including poverty levels. The exclusion of undocumented immigrants in the Census base count will very likely result in a lower percentage of CDBG funds allocated to the areas that CASA serves, and therefore CASA will receive fewer such funds.

40. CASA has an ongoing commitment to promote participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, CASA is participating in ongoing outreach and education work.

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41. CASA plans to continue its Get Out the Count efforts during the NRFU. But CASA's efforts will be undermined by the decision to exclude undocumented immigrants from the congressional apportionment because this will decrease participation among undocumented immigrants who will believe that they no longer need to complete the Census, and it will heighten fear of interacting with government workers among immigrant communities of color. This fear extends not only to undocumented immigrants but also to family members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

42. Because of the difficulties created by the decision to exclude undocumented immigrants from the Census count base, CASA will be forced to expend more resources on its Decennial Census outreach efforts to reduce the effect of this change in policy on the response rates in the immigrant communities of color it serves.

43. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the Census count base, CASA will need to divert resources from other areas critical to its mission, including job training and health outreach.

4. The American-Arab Anti-Discrimination Committee

44. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending and promoting the rights and liberties of Arab-Americans and other persons of Arab heritage. ADC is the largest American-Arab grassroots civil rights organization in the United States.

45. Founded in 1980 by former Senator James Abourezk, ADC's objectives include combating stereotypes and discrimination against and affecting the Arab-

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American community in the United States, serving as a public voice for the Arab-American community in the United States on domestic and foreign policy issues, and educating the American public in order to promote greater understanding of Arab history and culture. ADC advocates, educates, and organizes to defend and promote human rights and civil liberties of Arab-Americans and other persons of Arab heritage.

46. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California, New York, and Texas. Its members are also active through ADC's 28 local chapters and organizing committees, located in 20 states and the District of Columbia, including in Tucson and Phoenix, Arizona; Los Angeles and Orange County, California; Miami and Orlando, Florida; New York, New York; and Austin and Dallas, Texas.

47. ADC has members in states with significant populations of undocumented immigrants, such as Texas, New York, Florida, California, Arizona and Illinois. These states—particularly Arizona, California, New York, and Texas—are likely to lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. Many but not all of ADC's members in these states are U.S. citizens. The loss of political representation and political power will injure ADC's members in these states.

48. The exclusion of undocumented immigrants in the Census base count will reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian Americans, Arab Americans, and other immigrant communities of color constitute significant portions of the population. This will injure ADC members who

reside in these areas, such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, Kings County, New York, and Prince George's County, Maryland. For example, ADC has members in these jurisdictions with children enrolled in Title I schools and members who use the roads on a regular basis and thus depend in part on federal highway funds for their upkeep.

49. As an organization, ADC is committed to promoting participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, ADC has undertaken engagement work within the Arab-American community. For example, ADC is conducting training for Census enumerators, running advertisements encouraging participation, and holding a strategy symposium, among other activities. ADC plans to continue its Get Out the Count work through the Non-Response Follow-Up time period.

50. ADC faces a difficult environment due to increased fear of interacting with government workers among the Arab-American community, a fear that will be heightened now because of the decision to exclude undocumented immigrants from the apportionment. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who fear that participating in the Decennial Census might endanger their loved ones.

51. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, ADC will be forced to invest more resources in its Decennial Census outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

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52. Because of the need to increase the time and money spent on Decennial Census outreach caused by the decision to exclude undocumented immigrants from the apportionment base, ADC will need to divert resources from other areas critical to its mission, including organizing, issue advocacy efforts, and educational initiatives.

5. The ADC Research Institute

53. Plaintiff ADC Research Institute ("ADCRI") is a 501(c)(3) corporation founded in 1982 by former Senator James Abourezk. ADCRI sponsors public programs and initiatives in support of the constitutional and First Amendment rights of Arab-Americans, as well as research studies, publications, seminars, and conferences that document discrimination faced by Arab-Americans in the workplace, schools, media and government agencies. These programs also promote a better understanding of Arab cultural heritage by the public and policy makers.

54. ADCRI is currently engaged in promoting Decennial Census participation among its constituents. ADCRI plans to continue this work through NRFU time period.

55. ADCRI is now facing a much more difficult environment due to increased fear in the Arab-American community of interacting with government workers, due in part to anti-immigrant actions such as the exclusion of undocumented immigrants from the apportionment base. Because of this heightened fear and suspicion, ADCRI will be forced to invest more resources in its outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

56. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the apportionment base, ADCRI will need to divert resources from other areas critical to its

mission, including its engagement with public school teachers and other educational issues

6. FIEL Houton Inc.

57. FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. FIEL is an immigrant-led organization who advocates for just laws for immigrant youth, their families, access to higher education for all people regardless of immigration status and access to justice for the community.

58. FIEL provides resources for undocumented students, understanding the path to college is unsteady for many first and even second-generation Americans. FIEL's office is open to anyone seeking guidance in their process of obtaining a higher education, including assistance with applying to college and applying for scholarships and other financial aid. FIEL also provides a variety of immigration services for our community—from providing legal counsel for immigrants to begin their pathway to citizenship to handling most immigration cases.

59. FIEL was born out of the need for civic engagement in support of undocumented students seeking a higher education and conducts organizing for the betterment of the communities they serve, including outreach and campaigns related to the 2020 Decennial Census directed at immigrant communities in Texas.

60. Today, FIEL has approximately 11,000 members in the greater Houston area who help lead FIEL's organizing. FIEL members reside in parts of Texas where immigrant communities of color constitute significant portions of the population, including Harris County.

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61. Texas would lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. The loss of political representation and political power will therefore injure FIEL's many members who live in Texas

62. FIEL members in Houston rely on a number of government services whose funding is allocated based on population and demographics determined by the decennial Census. This includes parents with children enrolled in Title I schools, drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs, and many other programs and facilities that receive Census-guided funding. FIEL members will be deprived of the benefits of census-guided funding to which they would be entitled by a more complete census count.

63. One of the many FIEL members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Deyanira Palacios. Ms. Palacios is a lawful permanent resident and a resident of Montgomery County, Texas. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives.

64. Another FIEL member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Karen Ramos. Ms. Ramos is a resident of Harris County, Texas, where she works as a realtor. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives. Ms. Ramos is entitled to remain and work lawfully in the United States through the Deferred Action for Childhood Arrivals ("DACA")

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Program. She is entitled to be counted in the ongoing 2020 Decennial Census along with all other residents of Texas, regardless of their immigration status.

65. The exclusion of undocumented immigrants from the census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, including Texas. This will injure FIEL and its members who benefit from census-guiding funding to carry out social service, health, and education programs in these areas.

66. As an organization, FIEL has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, FIEL has and will continue to invest resources in Get Out the Count efforts.

67. The Census is ongoing, with the Census Bureau's Non-Response Follow-Up just getting started. FIEL plans to continue its Get Out the Count efforts during this Non-Response Follow-Up. In its extensive Decennial Census outreach, FIEL will now face a more difficult environment due to the perception among undocumented immigrants in Texas that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

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68. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, FIEL will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to FIEL's Get Out the Count efforts will diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, FIEL has already, and will continue to, divert resources from its other organizational priorities, including its work on access to education for students, to address these concerns about decreased census participation within immigrant communities.

69. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision to exclude undocumented immigrants from the apportionment base, FIEL will need to divert resources from other areas critical to its mission such as other civic engagement activities.

B. Defendants

70. Defendant Donald J. Trump is the President of the United States. In that capacity, Defendant Trump issued a July 21, 2020 Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, described *infra*. As President, he has the statutory responsibility of transmitting to Congress "a statement showing *the whole number of persons* in each State, excluding Indians not taxed, as

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ascertained under the seventeenth and each subsequent decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a (emphasis added). He is sued in his official capacity.

71. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Decennial Census. 13 U.S.C. § 4.

72. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He oversees the Bureau of the Census ("Census Bureau") and is thus responsible for conducting the Decennial Census of the population. 13 U.S.C. § 141(a). He has statutory responsibility to "take a decennial census of the population," 13 U.S.C. § 141(a), and for reporting to the President by January 1, 2021, a "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). He is sued in his official capacity.

73. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency responsible for planning and administering the Decennial Census.

74. Defendant Steven Dillingham is the Director of the Census Bureau and thus has responsibility for administering a complete count of all persons residing in the United States, including for the purpose of providing that figure to the Secretary of Commerce for transmission to the President. He is sued in his official capacity.

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FACTS

A. Background on the Decennial Census

1. The Constitutional Command to Include All People in the Census for Purposes of Congressional Apportionment

75. The Constitution requires a Decennial Census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers" (the Apportionment Clause). U.S. Const. art. I, § 2, cl. 3. It also directs that "[t]he 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" (the Census Clause). *Id.*

76. Key here, Section 2 of the Fourteenth Amendment provides 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." *Id.* amend. XIV, § 2 (emphasis added).

77. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count *every single person* residing in the United States, whether citizen or noncitizen, *whether living here with legal status or without*," and "[t]he population count derived from that effort is used . . . to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019) (emphases added).

78. Consistent with this express constitutional mandate, the federal government has conducted a Census that includes all persons living in the United States, regardless of citizenship or legal status, every ten years since 1790.

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79. This was historically subject to only two qualifications, both contained in the explicit text of the Constitution: "Indians not taxed," and the Three-Fifths Clause for persons who were enslaved. The first exception has not been relevant for some time; the second, the Three-Fifths Clause, assumed that enslaved persons would be included in the Census, but provided that they would not be counted as full persons for the purposes of calculating population for congressional apportionment.

80. The explicit nature of these two qualifications, neither of which applies in modern times, reinforces that the Decennial Census and the resulting apportionment base must include every person physically living in the United States.

81. The Civil War and the abolition of slavery repudiated the Three-Fifths Clause, which the Fourteenth Amendment then repealed. During debates over the Reconstruction Amendments, Congress considered, and affirmatively rejected, proposals that would have altered Congressional apportionment to be based on the population of voters, rather than total population. Thaddeus Stevens introduced a constitutional amendment that would have apportioned House seats "according to their respective legal voters." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 10 (1866)). Congress rejected that proposal. *Id.*

82. As ratified, Section 2 of the Fourteenth Amendment carried forward the basic total population mandate of the Apportionment Clause, providing, as stated, 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."

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83. In introducing this final language on the Senate Floor, Senator Jacob Howard explained the provision as follows:

> [The] basis of representation is numbers . . . that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime . . . . The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.

Evenwel, 136 S. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766-2767 (1866)).

84. In *Evenwel v. Abbott*, the Supreme Court held that Section 2 of the Fourteenth Amendment "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128. The proposition that non-citizens must be included in the population base for apportioning the total number of U.S. House seats to each state was central to the Court's holding that the Fourteenth Amendment does not prohibit states from including non-citizens in drawing legislative districts within a state. The Court explained: "It 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. The concurring Justices agreed that "House seats are apportioned based on total population." *Id.* at 1148 (Alito, J., concurring in the judgment); *see also id.* at 1138 (Thomas, J., concurring in the judgment) ("[F]eatures of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants."). *See also Wesberry v. Sanders*, 376 U.S. 1,

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14 (1964) (noting that the "principle solemnly embodied in the Great Compromise" is "equal representation in the House for equal numbers of people").

85. Lower courts have similarly recognized that the Constitution requires that all people be included in the population totals used for Congressional apportionment, regardless of citizenship status. As a three-judge panel of the District Court for the District of Columbia explained:

> The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all- inclusive. . . We see little on which to base a conclusion that illegal aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980); *see also, e.g.*, *New York*, 351 F. Supp. 3d at 514.

2. *The Government's Repeated Acknowledgment of Its Constitutional Obligation to Include All People in the Census for Purposes of Congressional Apportionment*

86. The Justice Department has likewise not only conceded but forcefully argued that it has a constitutional obligation to count every person residing in the United States no matter their immigration status, and to use that data for apportionment purposes.

87. Facing a legal challenge in the early 1980s to the inclusion of undocumented immigrants in apportionment figures in *Federation for American Immigration Reform v. Klutznick*, the Government argued that the plaintiffs there sought "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."

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Defs.' Post-Arg. Memo. at 1, No. 79-3269 (D.D.C. Feb. 15, 1980). It explained that the "Constitution expressly requires the enumeration of the 'whole number of persons in each State' for purposes of apportionment of Representatives to the United States Congress and none of plaintiffs' legal theories puts in doubt that the plain meaning of this language must be given effect," and that the Census "has never . . . excluded from the apportionment base any inhabitant counted in the decennial census." Defs.' Reply Memo. & Opp'n to Pls.' Mot. for Summ. J. at 1, No. 79-3269 (D.D.C. Jan. 30, 1980).

88. The Government also rejected any policy rationale for overriding the constitutional mandate to include all persons in the enumeration for purposes of congressional apportionment, noting that the "constitutionally mandated requirement to count states' inhabitants for apportionment purposes is a matter separate from the need to solve the problems of illegal immigration." *Id.*

89. Similarly, in a September 22, 1989 letter, Carol Crawford, the Assistant Attorney General for Legislative Affairs, advised Senator Jeff Bingaman that the Justice Department had "found no basis" for reversing its existing position that the Census Clause and Section 2 of the Fourteenth Amendment "require that inhabitants of States who are illegal aliens be included in the census count."[3]

90. More recently, in *New York v. Department of Commerce*, the Government argued in its Motion to Dismiss that the "Constitution supplies a simple judicial standard for determining the constitutionality of [Census Bureau] practices—the Secretary must perform a person-by-person headcount, rather than an estimate of population." Memo. of

[3] Letter from Assistant Attorney Gen. Carol T. Crawford to Honorable Jeff Bingaman (Sept. 22, 1989), *in* 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989).

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Law in Support of Defs.' Mot. to Dismiss at 25, No. 1:18-cv-02921, ECF No. 155 (S.D.N.Y. May 25, 2018). Similarly, it contended that "where, as here, there is no allegation that the Secretary failed to establish procedures for counting every person, a case ceases to implicate 'actual Enumeration . . . .'" Reply Memo. of Law in Further Support of Defs.' Mot. to Dismiss at 7, No. 1:18-cv-02921, ECF No. 190 (S.D.N.Y. July 13, 2018).

91. The Government embraced the requirement that every person living in the United States must be included in the Census even more directly in its Post-Trial Proposed Findings of Fact in *New York v. Department of Commerce*, writing that the "Constitution requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Pls.' Claims at 1, No. 1:18-cv-02921, ECF No. 546 (S.D.N.Y. Nov. 21, 2018) (internal citations omitted).

92. Even more recently, in ongoing litigation in Alabama over the inclusion of undocumented immigrants in the Census, the Government argued that "[t]he very purpose of the census . . . is to count the number of people residing in each state." Memo. of Law in Support of Defs.' Mot. to Dismiss at 1, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772, ECF No. 45-1 (N.D. Ala. Nov. 13, 2019).

3. The Statutory Requirements to Include All People in the Census for Purposes of Congressional Apportionment

93. Article I, Section 2 of the Constitution provides that the Census may be conducted "in such manner as [Congress] shall direct by law." Congress has codified this

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command in a statutory scheme primarily contained in Title 13 of the United States Code, also known as the Census Act.

94. Congress delegated to the Secretary of Commerce responsibility for conducting the Census, providing that he "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date' . . . ." 13 U.S.C. § 141(a).

95. Congress has also created the Census Bureau within the Department of Commerce and authorized the Secretary of Commerce to delegate his duties under the Census Act to the Census Bureau. 13 U.S.C. §§ 2, 4.

96. The Secretary must report to the President a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" within nine months of the Census date. 13 U.S.C. § 141(b).

97. The President then performs a "ministerial" calculation of the number of U.S. House seats to which each state is entitled. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). The President is "require[d]" to use only "data from the decennial census" to perform this calculation, *id.* at 797, and the calculation must use a specific formula with "rigid specifications . . . provided by Congress itself, and to which there can be but one mathematical answer." *Id.* at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5).

98. The President must then transmit to Congress, "[o]n the first day, or within one week thereafter, of the first regular session . . . a statement showing *the whole number of persons* in each State . . . as ascertained under the . . . decennial census of the population," and "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives *by the method*

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known as the method of equal proportions." 2 U.S.C. § 2a (emphases added). The "method of equal proportions" is the specific formula prescribed by Congress that calculates the number of House seats for each state based on the total population of each state as enumerated in the Decennial Census.

99. Though the primary purpose of the Census enumeration remains the apportionment of Congressional seats (as well as, by extension, Presidential electors), the population count from the Decennial Census is also used by the states for decennial redistricting of state legislative districts; helps to determine the distribution of hundreds of billions of dollars of federal funding; and informs the decisions of federal, state, and local policymakers and private businesses.

4. The Census Bureau's Repeated Acknowledgments that All People Must Be Included in the 2020 Census for Purposes of Congressional Apportionment

100. After more than a decade of preparation, the 2020 Census is currently being conducted, with "Census Day" having occurred on April 1. Beginning in January in some places, and in March nationwide, Americans were asked to respond to the Census questionnaire online, by phone, or by mail. And while there have been some delays due to the COVID-19 pandemic, in-person NRFU is currently scheduled to take place between August 11 and October 31.[4]

101. Throughout the entire process of preparing for and conducting the 2020 Census, the Census Bureau has consistently represented that it would adhere to the

[4] *See* Census Bureau, *Overall Timeline*, https://2020census.gov/en/important-dates.html (last visited July 21, 2020).

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centuries-old practice of counting every person living in the United States—including undocumented immigrants—for apportionment and other purposes.

102. In fact, the Census Bureau has formally adopted a rule—pursuant to a notice-and-comment rulemaking process—that undocumented immigrants must be counted where they live and included in apportionment numbers. On February 8, 2018, the Census Bureau promulgated its "Residence Rule" for the 2020 Census, which lays out this requirement. 83 Fed. Reg. 5525 (Feb. 8, 2018) (formally titled "Final 2020 Census Residence Criteria and Residence Situations.").

103. The Residence Rule explains that the "residence criteria" are "used to determine where people are counted during each decennial census." *Id.* at 5526. The Residence Rule indicates that the criteria for determining residency set forth in the rule must then be used "to apportion the seats in the U.S. House of Representatives among the states" and that "[a]pportionment is based on the resident population, plus a count of overseas federal employees, for each of the 50 states." *Id.* at 5526 n.1.

104. The Residence Rule provides that "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The Census Bureau elaborated that the "Census Bureau is committed to counting every person in the 2020 Census," including citizens of foreign countries living in the United States. *Id.* at 5526. The Census Bureau considered a comment which "expressed concern about the impact of including undocumented people

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in the population counts for redistricting because these people cannot vote."[5] In response, the Census Bureau declined to make any changes to its residence criteria and indicated that it "will retain the proposed residence situation guidance for foreign citizens in the United States." *Id.* at 5530.

105. As of July 21, 2020, a copy of these criteria was available unchanged on the Census Bureau website, including the provision for foreign citizens:[6]

3. **FOREIGN CITIZENS IN THE UNITED STATES**
   a) ***Citizens of foreign countries living in the United States*** - Counted at the U.S. residence where they live and sleep most of the time.
   b) ***Citizens of foreign countries living in the United States who are members of the diplomatic community*** - Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.
   c) ***Citizens of foreign countries visiting the United States, such as on a vacation or business trip*** - Not counted in the census.

106. As of July 21, 2020, a webpage maintained by the Census Bureau addressing "Frequently Asked Questions on Congressional Apportionment" noted that resident population counts "include all people (citizens and non-citizens) who are living in the United States at the time of the census," and explicitly affirmed that undocumented residents must be included in the population totals used for Congressional apportionment:[7]

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[5] Final 2020 Census Residence Criteria and Residence Situations, Federal Register, Vol. 83, No. 27, Thursday, February 8, 2018, https://www.govinfo.gov/content/pkg/FR-2018-02-08/pdf/2018-02370.pdf (last visited July 21, 2020).

[6] Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States*, https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last visited July 21, 2020).

[7] Census Bureau, Frequently Asked Questions on Congressional Apportionment, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q6 (last visited July 21, 2020).

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Who is included in the apportionment population counts?

The apportionment population count for each of the 50 states includes the state's total resident population (citizens and non-citizens) plus a count of the overseas federal employees (and dependents) who have that state listed as their home state in their employers' administrative records.

For details on who is counted (and where they are counted) in the 2020 Census, see the 2020 Census Residence Criteria and Residence Situations.

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Who is included in the resident population counts?

The resident population counts include all people (citizens and non-citizens) who are living in the United States at the time of the census. People are counted at their usual residence, which is the place where they live and sleep most of the time.

The resident population also includes military and civilian employees of the U.S. government who are deployed outside the United States (while stationed or assigned in the United States) and can be allocated to a usual residence address in the United States based on administrative records from the Department of Defense.

Are undocumented residents included in the apportionment population counts?

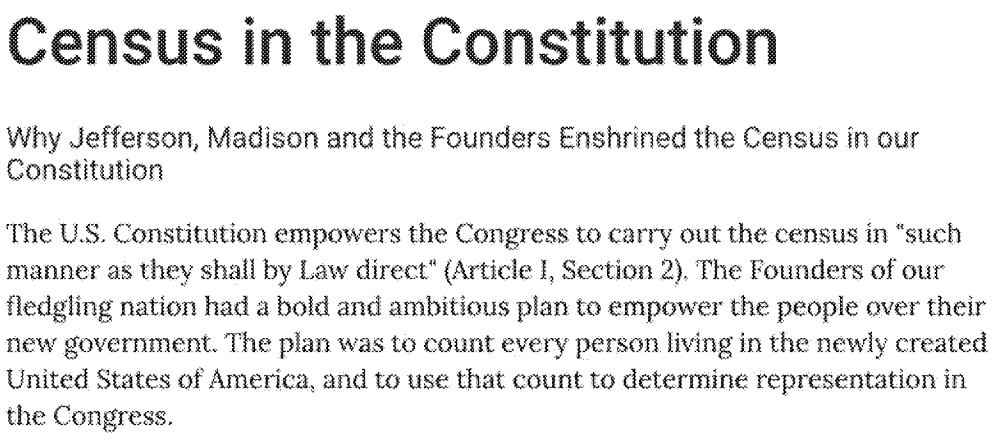
Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are included in the resident population for the census, which means they are all included in the apportionment counts.

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107. Likewise, as of July 21, the "Census in the Constitution" page on the Census Bureau website noted that "[t]he plan [of the Founders] was to count every person living in the United States of America, and to use that count to determine representation in Congress:"[8]

[8] Census Bureau, *Census in the Constitution*, https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html (last visited July 21, 2020).

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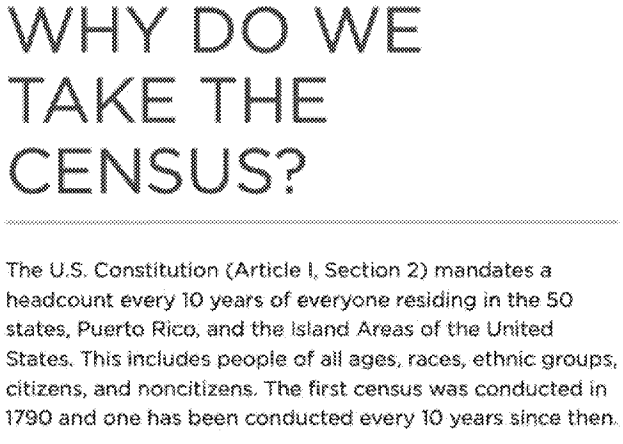


Census in the Constitution

Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution

The U.S. Constitution empowers the Congress to carry out the census in "such manner as they shall by Law direct" (Article I, Section 2). The Founders of our fledgling nation had a bold and ambitious plan to empower the people over their new government. The plan was to count every person living in the newly created United States of America, and to use that count to determine representation in the Congress.

108. Similarly, the Census Bureau's 2020 guide for Complete Count Committees, which are volunteer organizations designed to boost Census participation, advised that the Census "mandates a headcount every 10 years of everyone residing in the 50 states," including "citizens, and noncitizens:"[9]



WHY DO WE TAKE THE CENSUS?

The U.S. Constitution (Article I, Section 2) mandates a headcount every 10 years of everyone residing in the 50 states, Puerto Rico, and the Island Areas of the United States. This includes people of all ages, races, ethnic groups, citizens, and noncitizens. The first census was conducted in 1790 and one has been conducted every 10 years since then.

[9] Census Bureau, *2020 Census Complete Count Committee Guide* at 1 (2018), https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf (last visited July 21, 2020).

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109. Similarly, on its webpage "Setting the Record Straight," as of July 21, 2020, the Census Bureau assured readers that "[e]veryone counts" and that "everyone living" in the United States, including non-citizens, is counted in the 2020 Census:[10]

Setting the Record Straight

Does the 2020 Census ask about citizenship status?

NO. The 2020 Census does not ask whether you or anyone in your home is a U.S. citizen.

Are non-citizens counted in the census?

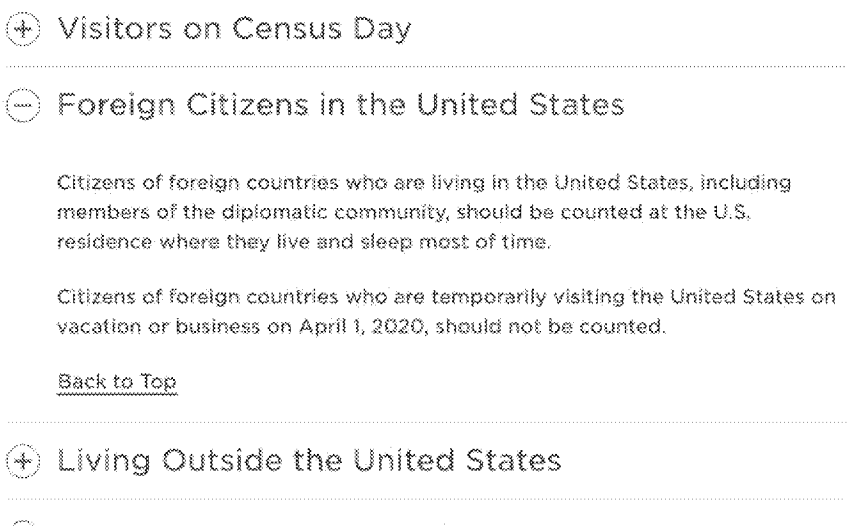
YES. Everyone counts. The 2020 Census counts everyone living in the country, including non-citizens. Learn more about who should be counted when you complete the 2020 Census.

110. As of July 21, the Bureau's "Who to Count" page repeated the same information:[11]

[10] Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html (last visited July 21, 2020).

[11] Census Bureau, *Who to Count*, https://2020census.gov/en/who-to-count.html (last visited July 21, 2020).

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111. And, as of July 21, the "Who Is Required to Respond" page on the Census Bureau's website for the 2020 Census also specified that "[e]veryone living in the United States . . . is required by law to be counted in the 2020 Census:"[12]



112. The 2020 Census is in process, but at this point remains far from enumerating the entire population. As of July 23, 2020, 62.3% of households in the United States have responded to the 2020 Census, according to the Census Bureau's estimates.[13] Included within this figure are likely significant numbers of undocumented immigrants who acted in good faith according to the Bureau's own instructions and

[12] Census Bureau, *Who Is Required to Respond*, https://2020census.gov/en/am-i-required.html (last visited July 21, 2020).

[13] Census Bureau, *Response Rates*, https://2020census.gov/en/response-rates.html (last visited July 21, 2020).

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responded to the census, with the understanding that they would be counted just like every other person living in the United States.

B. Defendants' First Attempt to Exclude Noncitizens from the Census: The Citizenship Question Litigation

113. This is not the first effort by Defendants to exclude noncitizens from the 2020 Census. Most notably, following the Secretary's March 2018 announcement that a citizenship question would be included on the Census, numerous plaintiffs, including Plaintiffs here, filed suit to block the question. After an eight-day bench trial, this Court issued a 277-page opinion and order including its findings of fact and conclusions of law. *See New York*, 351 F. Supp. 3d 502. The Court concluded that Plaintiffs had standing to sue because the inclusion of a citizenship question on the Census would deter participation in the Census by households with a noncitizen, leading to an undercount of such households, and that Defendants violated the Administrative Procedure Act in various ways, including by offering a "pretextual" rationale, *id.* at 516—Voting Rights Act ("VRA") enforcement—for the Secretary's decision. *Id.* at 516.

114. The Supreme Court affirmed, finding that the Secretary's VRA rationale was "incongruent with what the record reveal[ed] about the agency's priorities and decision-making process" and "contrived." *Dep't of Commerce*, 139 S. Ct. at 2575-76. The Secretary's March 2018 decision thus failed the basic requirement that agencies "pursue their goals reasonably," and was unlawful. *Id.* at 2576.

115. The Secretary's "contrived" pretext was pierced during discovery in a separate state court lawsuit, *Common Cause v. Lewis*, No. 18-CVS-14001 (N.C. Super. Ct.), where information that had been wrongfully concealed in discovery before this

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Court revealed the true genesis of the decision to add a citizenship question to the 2020 Census. The evidence was discovered on the hard drive of Dr. Thomas Hofeller, a North Carolina-based longtime Republican strategist and redistricting expert who died in August 2018.[14]

116. In late August 2015, Hofeller was commissioned by the Washington Free Beacon, a conservative website, to study the "practicality" and "political and demographic effects" of using citizen voting age population ("CVAP") instead of total population ("TPOP") to achieve equal population in redistricting.[15] Hofeller advised that if a citizenship question were added to the 2020 Decennial Census so as to enable the exclusion of non-citizens from the population base in redistricting, the results "would be advantageous to Republicans and Non-Hispanic Whites."[16]

117. Documents also revealed that Hofeller in 2015 communicated directly with Census Bureau official Christa Jones, using her private email address, and that Jones notified Hofeller of the Federal Register's notice for comment regarding the Census Bureau's Content Test for that year, suggesting that there was "an opportunity to mention citizenship."[17] Hofeller subsequently helped ghostwrite a draft DOJ letter to Commerce

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[14] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Apr. 21, 2018) https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

[15] Pls.' Mot. for Order to Show Cause Ex. C at 1-2, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[16] Pls.' Mot. for Order to Show Cause Ex. D at 9, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[17] Tara Bahrampour, *GOP strategist and census official discussed citizenship question, new documents filed by lawyers suggest*, Wash. Post (June 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-

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requesting a citizenship question that subsequently came into the possession of his "good friend[]" Mark Neuman, Defendant Secretary Ross's "trusted" and "expert adviser" on census issues, who "act[ed] analogously to an agency employee."[18] Following a call between then-North Carolina Congressman (and now Defendant Trump's Chief of Staff) Mark Meadows and Defendant Secretary Ross, senior aides of Secretary Ross facilitated a meeting at which Neuman provided Hofeller's draft to John Gore, the Acting Assistant Attorney General for Civil Rights, who ultimately "requested" that the Bureau include a citizenship question on the census.[19] Meanwhile, Jones eventually came to serve as Chief of Staff to the Acting Director of the Census Bureau at the time of Defendant Secretary Ross's March 2018 Decision Memorandum ordering the inclusion of a citizenship question on the census. Jones later testified that Hofeller favored adding a citizenship question to the census to aid "the Republican redistricting effort" and that Hofeller's business partner, Dale Oldham, advocated for a citizenship question for redistricting and apportionment purposes "more times than I can remember."[20]

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connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/.

[18] NYIC Pls.' Mot for Sanctions, 1:18-cv-2921 (JMF), ECF No. 635-1 at 124-136; Def's Opp. to Ltr. Mot. to Compel, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 451 at 3 (S.D.N.Y. Oct. 30, 2018).

[19] Pls.' Joint Proposed Post-Trial Findings of Fact, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 545 at 52-53 ¶¶ 364-69 (S.D.N.Y. Nov. 21, 2018) (citing trial exhibits).

[20] Memorandum from Acting Chairwoman Carolyn B. Maloney to Members of the United States House Committee on Oversight, *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress*, 12 (Nov. 12, 2019) https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf.

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118. Subsequent statements by Defendant Trump and other Administration officials and advisors confirmed that a discriminatory intent to exclude noncitizens—and particularly, undocumented immigrants—from redistricting was the actual purpose of the effort to add a citizenship question to the Census.

119. For example, on July 1, 2020, Defendant Trump stated that a citizenship question was "very important to find out if someone is a citizen as opposed to an illegal," and that "Democrats want to treat the illegals, with healthcare and other things, better than they treat the citizens of this country."[21]

120. Defendant Trump himself has repeatedly admitted that his administration sought to add the citizenship question to harm immigrant communities by excluding them from the decennial enumeration and thus from redistricting and apportionment. About a week after the Supreme Court's holding in *Department of Commerce*, Defendant Trump, asked why he was still trying to get a citizenship question on the census, said: "Number one, you need it for Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going? How many people are there?"[22]

121. Days later, at a press conference in the White House Rose Garden, Defendant Trump similarly stated that the citizenship information his administration sought is "relevant to administering our elections. Some states may want to draw state

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[21] *Remarks by President Trump at Signing of H.R. 3401*, White House (July 1, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/.

[22] Remarks by President Trump Before Marine One Departure, White House (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/).

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and local legislative districts based upon the voter-eligible population."[23] In particular, Defendant Trump urged states to apportion and redistrict on the basis of citizen voting age population instead of total population, as Hofeller had advised, because he suggested that the move might be immune from judicial scrutiny: "Indeed, the same day the Supreme Court handed down the census decision, it also said it would not review certain types of districting decisions, which could encourage states to make such decisions based on voter eligibility."[24]

122. At the same press conference, Defendant Trump stated: "As shocking as it may be, far-left Democrats in our country are determined to conceal the number of illegal aliens in our midst. They probably know the number is far greater, much higher than anyone would have believed before. Maybe that's why they fight so hard. This is part of a broader left-wing effort to erode the rights of the American citizen."[25]

123. Several of Defendant Trump's associates and agents also stated—in the wake of the Supreme Court's ruling in *Department of Commerce*—that excluding noncitizens from the census is necessary either to curtail immigration or limit the political power of immigrant communities of color.

124. Matt Schlapp, Chairman of the American Conservative Union and husband to Mercedes Schlapp, Defendant Trump's Director of Strategic Communications, tweeted on June 27, 2019 that he wanted to "impeach[] the Chief

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[23] *Remarks by President Trump on Citizenship and the Census*, White House (July 11, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[24] *Id.*

[25] *Id.*

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Justice [Roberts]" for "angling for vast numbers of illegal residents to help Dems hold Congress."[26]

125. Former Vice Chair of the President's Commission on Electoral Integrity and anti-immigrant zealot Kris Kobach stated on July 8, 2019 that he "advised the President on putting the citizenship question back on the U.S. Census," adding that he wanted to "make it a requirement in federal law that we must ask the question in every census going forward."[27] A supplement to the Administrative Record in the citizenship question litigation revealed that Secretary Ross (at the behest of former White House senior advisor Steve Bannon) had discussed adding a citizenship question with Kobach, who advised that the question's absence on the census "leads to the problem that aliens … are still counted for congressional apportionment purposes." In separate public statements, Kobach reiterated that the purpose of adding a citizenship question to the census was "so Congress [can] consider excluding illegal aliens from the apportionment process,"[28] because "citizens in a district with lots of illegal aliens have more voting power than citizens in districts with few illegal aliens."[29]

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[26] Matt Schlapp (@mschlapp),, Twitter (June 27, 2019, 8:29 AM), https://twitter.com/mschlapp/status/1144266564935528449.

[27] Pilar Pedraza (@PilarPedrazaTV), Twitter (July 8, 2019), https://twitter.com/PilarPedrazaTV/status/1148296658943381508.

[28] Kris Kobach, *Exclusive—Kobach: Bring the Citizenship Question Back to the Census*, Breitbart (Jan. 30, 2018), http://www.breitbart.com/big-government/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/.

[29] Kris Kobach, *Why the Citizenship Question is So Important*, Breitbart (June 27, 2019), https://www.breitbart.com/politics/2019/06/27/kobach-why-the-citizenship-question-is-so-important/.

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126. Defendant Trump has also repeatedly denigrated and dehumanized non-white immigrants. He has stated that certain immigrants "aren't people, these are animals,"[30] and his administration has housed immigrant children in cages and separated them from their families.[31] Indeed, Defendant Trump has long complained about the growth of immigrant communities of color, tweeting in 2015: "How crazy - 7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[32]

127. Secretary Ross has publicly supported the Trump Administration's anti-immigrant agenda, applauding Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse, and chain immigration."[33]

128. This slew of public statements and actions—from Defendant Trump and some of his highest-level advisers and administration officials—shows clearly that the true rationale for a adding a citizenship question is driven by racial animus against immigrants of color and a desire to curb the political power of immigrant communities of color.

C. The Presidential Memorandum to Exclude Undocumented Immigrants from the Census

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[30] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[31] BBC, *Trump migrant separation policy: Children 'in cages' in Texas*, June 18, 2018, BBC News, https://www.bbc.com/news/world-us-canada-44518942.

[32] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[33] Press Release, Commerce Dep't, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps.

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129. Where subterfuge has failed, Defendants have now turned to executive fiat. Barred from including a citizenship question on the 2020 Census, Defendants have now contrived a new scheme to identify and directly exclude undocumented immigrants from the Actual Enumeration required for apportionment. On July 21, 2020, Defendant Trump issued a presidential memorandum to the Secretary of Commerce entitled, "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census."[34]

130. The Memorandum wrongly asserts that "[t]he Constitution does not specifically define which persons must be included in the apportionment base," that "persons in each state" has been interpreted to mean "inhabitants," that the scope of the term "inhabitants" requires "the exercise of judgment," and that the President purportedly has discretion to exercise that judgment to exclude entire categories of persons who reside in the United States. *Id.*

131. On this asserted legal basis, the Memorandum declares that for reapportionment following the 2020 Census, "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* § 2.

132. The Memorandum states that the Secretary, in submitting his Census report under 13 U.S.C. § 141(b), "shall take all appropriate action, consistent with the

[34] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/.

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Constitution and other applicable law" to provide information to the President to allow for the exclusion of undocumented immigrants. *Id.* § 3.

133. By its explicit and emphatic declaration of federal policy, the Memorandum directs the Commerce Department (and through the Commerce Department, the Census Bureau) to take steps to allow the President to exclude undocumented immigrants in his apportionment report to Congress issued under 2 U.S.C. § 2(a). *Id.* This includes, but is not limited to, "provid[ing] information" in the report that the Secretary must provide to the President under 13 U.S.C. § 141(b) that will "permit[] the President" to exclude undocumented immigrants in calculating the number of U.S. House seats to which each state is entitle. *Id.*

134. The Memorandum asserts that excluding undocumented immigrants is justified because "the principles of representative democracy" are undermined by tying the political influence of states to a population that includes undocumented immigrants. Memorandum, § 2.

135. In an accompanying statement, Defendant Trump declared that the Memorandum followed through on his commitment to determine the citizenship status of the population, and argued that "the radical left is trying to erase the existence of [the concept of American citizenship] and conceal the number of illegal aliens in our country" as "part of a broader left-wing effort to erode the rights of Americans [sic] citizens."[35] The statement repeated the Memorandum's argument that counting undocumented

[35] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

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immigrants creates "perverse incentives," and that "we should not give political power to people who should not be here at all."[36]

136. Upon information and belief, following receipt of the Memorandum, the Department of Commerce has issued directives to the Census Bureau, constituting final agency action, to implement the policy of excluding noncitizens from the enumeration used for congressional apportionment, as set forth in the Memorandum.

137. On June 23, 2020, Defendant Trump's re-election campaign sent an email making plain that the intent of the Memorandum is to undermine the Census and demonize immigrants. The email characterized the Memorandum as an "Executive Order" that "will block" undocumented people from "receiving congressional representation" and from "being counted in the U.S. Census."[37] The email claimed that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens."[38]

D. The Effect of Excluding Undocumented Immigrants from the Census

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[36] *Id.*

[37] Hansi Lo Wang (@hansilowang), TWITTER (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672.

[38] *Id.* *See also* Tara Bahrampour, *Trump's reelection campaign calls for adding citizenship question to 2020 census amid criticism that he is politicizing the count*, Wash. Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html (describing a "Trump reelection campaign" email that asked supporters whether they "support[ed] the president in adding a citizenship question" to the Census and noting that critics described the email as "demoralizing," "an assault on the constitution," and "a sly attempt to rally the president's base").

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138. Pew Research Center has estimated that the total population of undocumented immigrants in the United States was 10.5 million people in 2017.[39] The Department of Homeland Security (DHS) has estimated that the total population of undocumented immigrants in the United States was 12 million in 2015.[40]

139. California, Texas, and New York are consistently three of the states with the largest populations of undocumented residents.

140. According to Pew Research Center, California had 2 million undocumented residents, Texas had 1.6 million undocumented residents, and New York had 650,000 undocumented residents in 2017, subject to an upward or downward variance of 50,000 people for each estimate.[41]

141. According to DHS, California had 2.9 million undocumented residents, Texas had 1.9 million undocumented residents, and New York had 590,000 undocumented residents in 2015.[42]

142. The current average population of each U.S. House district is 710,767 people.

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[39] Jeffrey S. Passel and D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Ctr. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.

[40] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[41] Passel and Cohn, *supra* note 38.

[42] Office of Immigration Statistics, *supra* note 46.

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143. The Memorandum expressly aims to alter Congressional apportionment based on states' undocumented populations. For example, it argues that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." Memorandum§ 2.

144. Of these states, the Memorandum specifically targets California, anticipating that excluding undocumented immigrants from the census would deprive California of multiple House seats (an thus, Electoral College votes). The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* Upon information and belief, this "one State" is California.

145. Unlawfully excluding undocumented residents from the population count used for apportionment will likely deprive several states—most particularly, Arizona, California, New York, and Texas—of at least one House seat (or will cause not to gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process.

146. Indeed, this Court found that Arizona, California, Florida, Illinois, New York, and Texas all faced a substantial certainty of losing a seat based on a differential undercount of 5.8% of all noncitizens in the 2020 census. *New York*, 351 F. Supp. 3d at 594, *aff'd in relevant part*, 139 S. Ct. 2551. The evidence upon which the Court based these findings—the testimony of Dr. Chris Warshaw—relied on smaller undercounts of

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noncitizens in each of these states than would be caused by the Memorandum. *See id.* (citing Warshaw Decl., Dkt. No. 526-1). A greater impact will occur for these states if ***100%*** of undocumented immigrants are removed from the apportionment count. Other studies have also confirmed the certainty that various states would lose a seat if undocumented residents are removed.[43]

147. But the effects of the Memorandum are likely to run even deeper. Like the failed effort to add a citizenship question to the census, the new policy of excluding undocumented immigrants from the census will broadcast a xenophobic message to immigrant communities about census participation, suppressing responses from households containing immigrants and noncitizens. This will result in the omission from the census not only of undocumented immigrants, but also noncitizen immigrants with legal status and United States citizens. The resulting undercount will harm the work of organizations—including that of the Plaintiffs here—in promoting census participation and will further strip representation and economic resources from communities with immigrant populations.

E. The Census Bureau's Likely Use of Statistical Modeling to Estimate the Undocumented Population

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[43] *See* Amelia Thomson-DeVeaux, *The Citizenship Question Could Cost California And Texas A Seat In Congress*, FiveThirtyEight (June 17, 2019), https://fivethirtyeight.com/features/the-citizenship-question-could-cost-california-and-texas-a-seat-in-congress/ (finding California, Arizona, and Texas would lose at least one seat in a poorly conducted census and 10% of households with undocumented immigrants undercounted). While there are questions about the accuracy of its expert's methodology, the State of Alabama has asserted essentially the same thing in separate litigation. *See* Expert Report of Dudley Poston at 28, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-00772-RD (N.D. Ala.) (opining that excluding undocumented residents from apportionment base would cause California, Texas, and New Jersey to lose seats).

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148. The Census Bureau does not have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction.

149. After completion of the citizenship question litigation, the Census Bureau indicated that it would seek to compile citizenship status information for Census respondents by using administrative records, including records from the Social Security Administration. Such administrative records, however, do not provide information as to *legal status*, as opposed to citizenship, and cannot be used to determine whether census respondents are *undocumented immigrants* specifically.

150. In fact, the Government has recently represented in separate litigation, via a declaration by Census Bureau Senior Advisor Enrique Lamas, that it "lack[s] . . . accurate estimates of the resident undocumented population" on a state-by-state basis.[44]

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[44] Defendants' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *State of Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020). *See also* Jeffrey Mervis, *Why the U.S. Census Bureau could have trouble complying with Trump's order to count citizens*, Science Mag. (Sept. 16, 2019), https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-trouble-complying-trump-s-order-count-citizens (detailing the "formidable challenge" in relying on administrative records); Comment from Campaign Legal Center, OMB Control Number 0607-0995, https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf (noting that "[s]tate administrative data on individual citizenship status are notoriously riddled with errors and outdated information" and "records misidentify naturalized U.S. citizens as non-U.S. citizens"); Jennifer Van Hook, *Counting 11 million undocumented immigrants is easier than Trump thinks*, The Conversation (July 17, 2019), https://theconversation.com/counting-11-million-undocumented-immigrants-is-easier-than-trump-thinks-120459 (observing that administrative records provide "inconsistent information about the same person," have "limited value for describing those who fall outside of the administrative records system," and will require researchers to "make assumptions about coverage error").

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151. In the absence of means to actually enumerate the total population of the United States minus undocumented immigrants, the Government has indicated its intention to use statistical modeling to estimate the undocumented population and thereby calculate an apportionment population that excludes undocumented immigrants. In separate litigation, Department of Justice attorney Stephen Ehrlich recently stated in a hearing that "there may need to be some statistical modeling" in order to carry out the Memorandum, though the Government had not yet "formulated a methodology."[45]

152. This statement is consistent with the previous efforts of governmental and non-governmental actors that have endeavored to project the population of undocumented immigrants in the United States. For example, Pew Research Center compiles statistical estimates of the population of undocumented immigrants rather than an actual enumeration, making a variety of statistical adjustments to the census population numbers and weighting the data.[46] DHS has similarly used statistical sampling methodology, the residual method, for estimated the populations of undocumented immigrants. [47]

153. The scope of any statistical model required to estimate the number of undocumented immigrants would be unprecedented for use in calculating the

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[45] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985

[46] *See*, J. Passel, *Measuring illegal immigration: How Pew Research Center counts unauthorized immigrants in the US* (July 12, 2019), https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/.

[47] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. DHS has not performed any estimates of the population of undocumented immigrants for any year since 2015.

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apportionment population. Such statistical processes are not an "actual Enumeration" as required under Article I of the Constitution. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 (1999); *id.* at 346 (Scalia, J., concurring) ("It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling.").

CAUSES OF ACTION

COUNT ONE
Violation of Enumeration and Apportionment (Article I, Section 2, Clause 3 of the Constitution, and Section 2 of the Fourteenth Amendment) (All Plaintiffs against All Defendants)

154. Plaintiffs repeat and re-allege by reference all of the previous allegations in this Complaint.

155. The Constitution requires that the apportionment of seats for the House of Representatives be conducted on the basis of the total population of all persons in each state, following each Decennial Census.

156. In particular, Article I, Section 2 of the Constitution requires 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," "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

157. Section 2 of the Fourteenth Amendment provides that "Representatives shall 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 (emphasis added).

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158. "Whatever his status under the immigration laws, an alien is . . . a 'person'" for purposes of the Fourteenth Amendment. *Plyler*, 457 U.S. at 210. A "person" means a "human being," *Black's Law Dictionary* (11th ed. 2019), and no matter what the Trump Administration may say, undocumented immigrants are human beings. Undocumented immigrants living in the United States are among the "whole number of persons in each State," U.S. Const. amend. XIV, § 2, and thus the plain and unequivocal text requires counting undocumented immigrants in the total population base used for Congressional apportionment.

159. The Supreme Court has definitively held that non-citizens must be included in the population base used to apportion U.S. House seats to each state. The Court held just four years ago that "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including non-citizens. *Evenwel*, 136 S. Ct. at 1129; *see also id.* at 1128 ("The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.").

160. Other courts, including this Court, have recognized the same. *See, e.g.*, *New York*, 351 F. Supp. 3d at 514 ("[T]he Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and "[t]he. population count derived from that effort is used . . . to apportion Representatives among the states"); *Klutznick*, 486 F. Supp. at 576 ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for

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apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'").

161. The Memorandum brazenly ignores this precedent and the plain text of the Constitution. It purports to unilaterally declare that undocumented immigrants are not "persons" under the Fourteenth Amendment. Based on that shocking and baseless assertion, the Memorandum declares it to be the explicit policy of the United States "to exclude from the apportionment base aliens who are not in a lawful immigration status." The Memorandum further directs the Secretary to provide the President with information in his Census report that excludes undocumented immigrants from the population count of each state, so as to permit the President to exclude such persons in reporting to Congress the number of each representatives to which each State is entitled, which the President will then do.

162. By denying undocumented immigrants are "persons" and excluding them from the total population count for congressional apportionment, the Memorandum violates the plain and straightforward command of the Enumeration Clause and the Fourteenth Amendment, as well as binding Supreme Court precedent.

163. The Memorandum further violates the Enumeration Clause and the Fourteenth Amendment by apportioning U.S. House seats among the states based on data other than the "numbers" reflecting the total population of each state as determined by the "actual Enumeration" of the Decennial Census.

164. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to each receive at least one fewer seat in

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the House of Representatives. Because these states will have at least one fewer congressional district than they would otherwise, each congressional district in these states will encompass more total people than it would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

165. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute substantial portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

166. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. at 2565–66; *Utah v. Evans*, 536 U.S. 452, 464 (2002); *U.S. House of Representatives*, 525 U.S. at 329–34.

COUNT TWO
Violation of Census Act
(2 U.S.C. § 2a(a); 13 U.S.C. § 141)
(*Ultra Vires*)

BC-DOC-0000001971

167. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

168. Congress has required that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" 13 U.S.C. § 141(a). "The tabulation of total population by States under subsection (a) of [§ 141] *as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b) (emphasis added).

169. In turn, "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and 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." 2 U.S.C. § 2a(a).

170. As the Supreme Court and the Census Bureau have recognized, these statutes require that persons whose "usual residence" is in the United States must be counted in the enumeration and apportionment of U.S. House seats at that "usual residence." "[T]he first census conducted in 1790 required that persons be allocated to their place of 'usual residence,'" and "'usual residence' has continued to hold broad connotations" through present day. *Franklin*, 505 U.S. at 803, 805. The Census Bureau has confirmed that its official policy today is that "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of

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'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time." Residence Rule, 83 Fed. Reg. at 5526.

171. Under the Census Bureau's Residence Rule, "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533.

172. The President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary of Commerce to tabulate and transmit reports to the President estimates of the total population in each State that are based on data other than the actual Enumeration of each state as determined by the decennial census, and that do not count all persons who live in the state as their "usual residence." Specifically, the President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary to rely on administrative data other than the actual Enumeration of each state as determined by the decennial census, and to exclude undocumented immigrants who reside in a state as their usual residence, in tabulating the total population of each state and transmitting those total population numbers to the President.

173. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by requiring the President to calculate and transmit to Congress total population figures for each state, and the apportionment of U.S. House seats among the states, based on data other than "decennial census of the population," and by using a method other than the "method of equal proportions" prescribed by Congress. 2 U.S.C. § 2a(a). The President may use only the actual enumeration of the total population of each State as "ascertained under the . . . decennial census"—and nothing else—to calculate the whole number of persons in each State and the number of Representatives for each state.

BC-DOC-0000001973

2 U.S.C. § 2a(a). Likewise, the "method of equal proportions" is a "rigid" formula "provided by Congress itself" that requires use of the total population of each State as determined based on the decennial census and no other administrative data. *Franklin*, 505 U.S. at 2775.

174. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by causing the President to transmit to Congress total population figures for each state that do not include all persons who live in each state as their "usual residence," and/or by causing the President to transmit to Congress a number of Representatives for each state that is calculated by excluding persons who live in each state as their "usual residence." If the Secretary of Commerce transmits one set of total population numbers to the President that *do* include undocumented immigrants who live in the United States as their usual residence (as the Secretary must do), then the President is required to use *that* set of total population numbers in transmitting to Congress "the whole number of persons in each State," and "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." 2 U.S.C. § 2a(a). The number of whole of persons in each state that the President must transmit to Congress must be that "ascertained under the . . . decennial census of the population," *id.*, which includes all persons living in the United States as their usual residence, 13 U.S.C. § 141(a)–(b). And it is "required for the apportionment of Representatives in Congress among the several States" that the President and the Secretary use the total population numbers tabulated for each state that include all persons who live in each state as their usual residence. 13 U.S.C. § 141(b).

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175. Because Defendant Trump and Secretary Ross will act beyond the scope of their statutory authority in a way that causes constitutional violations, they are acting *ultra vires* pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141. *See, e.g.*, *Mountain States Legal Foundation v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) ("[T]he Supreme Court has indicated generally that review is available to ensure that Proclamations are consistent with constitutional principles and the President has not exceeded his statutory authority."); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority. . . . That the executive's action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

176. The Memorandum also will result in the President and Secretary Ross failing to perform their clear legal duties to, among other things: tabulate the total populations of the States based on data from the decennial census that includes all persons who live in the United States as their usual residence; calculate the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence; and transmit to Congress the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence.

177. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives.

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Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

178. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

179. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT THREE
Discrimination on the Basis of Race and National Origin
(Fifth and Fourteenth Amendments of the U.S. Constitution)
(All Plaintiffs against All Defendants)

180. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

BC-DOC-0000001976

181. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the federal government not deny people the equal protection of its laws and prohibits the federal government from discriminating against individuals in the United States on the basis of race, ethnicity, national origin, and citizenship. U.S. Const. amend V.

182. The Supreme Court has affirmed the clear text of the Fifth Amendment by recognizing its constitutional protections apply to "person[s]" within the jurisdiction of the United States, and not only to citizens. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (Field, J., concurring) ("[t]he term 'person,' used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic"); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

183. The Fifth Amendment's Due Process Clause "applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

184. The "bedrock protections of the Fifth Amendment's Due Process Clause" are not eliminated by the "mere act of entry into the United States without documentation." *Garza v. Hargan*, 874 F.3d 735, 737–38 (D.C. Cir. 2017) (Millett, J., concurring).

185. The Fifth Amendment's prohibition on discrimination on the basis of race, ethnicity, national origin, and citizenship is co-extensive with the Equal Protection guarantees of the Fourteenth Amendment, which the Supreme Court has long recognized extends to undocumented immigrants. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [and is] universal in [its] application, to

all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In more recent years, the Supreme Court has reaffirmed that "aliens whose presence in this country is unlawful . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210.

186. The Memorandum violates the Fifth Amendment's prohibition on discrimination in at least two distinct respects. First, it facially targets undocumented immigrants for exclusion from the decennial enumeration, outright denying them the status of "persons" under the Constitution. Government action denying the *personhood* of people living in the United States echoes the darkest chapters of American constitutional history. *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

187. Second, as with the failed scheme to include a citizenship question on the census, this latest discriminatory act is motivated by a bare desire to harm immigrant communities of color, and particularly Latinx communities, by reducing their political clout and access to federal resources.

188. Defendant Trump and nativist members of his Administration view non-white, undocumented immigrants as a political and cultural threat. The President, as noted *supra*, has directed particularly virulent animus at Latinx immigrants. Defendant Trump and members of his Administration have long warned about the consequences of rising Latinx political power in the United States and the ostensible harms of undocumented immigrants to the United States.

BC-DOC-0000001978

189. The Memorandum not only would codify the animus and discriminatory goals of Defendants, but it would result in a cascade of discriminatory effects, including, but not limited to:

a. The loss of congressional seats and Electoral College votes in states where these groups constitute significant portions of the population and where Plaintiffs have members, including a certainly impending loss for California; a substantial risk of a loss for New York, Texas, Florida, Arizona, and Illinois; and a considerable risk of a loss for New Jersey and Georgia; and

b. A substantial reduction in the amount of federal funds distributed to the local and state governments in which the Plaintiffs reside, which all have significant, non-white populations; and

c. A reduction of the political influence to which these communities would receive through an accurate census count.

190. In addition to the discriminatory effects evidence well-known and acted upon by Defendants and the direct intent evidence outlined, the haphazard process through which the Defendants promulgated this Memorandum provides strong circumstantial evidence of discriminatory intent. This evidence includes the timing of the release of the Memorandum, which coincides with dispatching of Census field operations to conduct outreach to groups the Defendant Trump has discouraged from participating with dark and racist presidential campaign statements; the bizarre procedural sequence and series of events leading up to the Memorandum; the President's repeated efforts to generate confusion surrounding and distrust of the Census process; the shallow justifications cited by the President for the memorandum; the historical background and

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substantive departures from prior precedents; contemporary statements of the President and other decisionmakers; and the profound unworkability of the Memorandum.

191. Defendants' violations of the Fifth Amendment will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

192. Defendants' violations of the Fifth Amendment also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

193. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

BC-DOC-0000001980

COUNT FOUR
Separation of Powers
(Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment)
(All Plaintiffs against Defendant Trump)

194. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

195. Article I of the U.S. Constitution, in conjunction with the Fourteenth Amendment, requires that the federal government conduct an "actual Enumeration" of the national population every ten years to determine the "whole number of persons" in the United States and within each state for the purpose of apportioning members of the House of Representatives to the respective states according to their population. U.S. Const. art I, § 2, cl. 3; *id.* amend. XIV, § 2.

196. The Constitution, through the Enumeration Clause, "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Dep't of Commerce*, 139 S. Ct. at 2566 (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)).

197. As the Supreme Court has noted repeatedly, through the Census Act, Congress "delegated to the *Secretary of Commerce* the tasks of conducting the decennial census 'in such form and content as he may determine,'"—not the President. *Id.* at 2567 (quoting 13 U.S.C. § 141(a)).

198. The text of the Census Act itself makes clear that Congress has delegated authority over the census to the *Commerce Secretary*, not the *President*.

199. Section 141(a) of the Census Act requires that "*[t]he Secretary shall*, in the year 1980 and every 10 years thereafter, take a decennial census of population as of

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the first day of April of such year, which date shall be known as the 'decennial census date', *in such form and content as he may determine*"—not the President. 13 U.S.C. § 141(a) (emphasis added).

200. Section 4 of the Census Act requires the Secretary, *not* the President, to "perform the functions and duties imposed upon him by this title." 13 U.S.C. § 4.

201. The Census Act plainly distinguishes between the Secretary and the President in their roles regarding the Census, as intended by Congress. *See, e.g.*, 13 U.S.C. § 141(b) ("The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported *by the Secretary to the President* of the United States.") (emphasis added); 13 U.S.C. § 21 (distinguishing between "the President" and "the Secretary").

202. The Constitution and Census Act thus make clear that the President has usurped powers Congress has delegated to the Secretary. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

203. The Constitution and Census Act are unambiguous: Congress has constitutional authority over the census, and it has delegated none of that authority to the President. The Memorandum therefore violates the Constitution's separation of powers.

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204. Defendants' constitutional violation causes ongoing harm to Plaintiffs and their members because as explained their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the populations; and provide services to undocumented immigrants, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

205. The Supreme Court has stated, "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Bond v. United States*, 564 U.S. 211, 222 (2011).

206. Defendants' violations of the constitutional separation of powers will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would other, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

207. Defendants' violations of the constitutional separation of powers also causes harm to Plaintiffs and their members because, as explained, some of their

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members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

208. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT FIVE
Administrative Procedure Act
(All Plaintiffs against Defendants Ross, Dillingham, Department of Commerce and Census Bureau)

209. Plaintiffs repeat and re-allege by reference all of the previous factual allegations in this Complaint.

210. The Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, provides for a cause of action against any final agency action, within the meaning of the APA.

211. Upon information and belief, the Department of Commerce has directed the Census Bureau to effectuate the Memorandum's policy of excluding noncitizens from the enumeration used to apportion congressional representation and has instructed the Census Bureau to that effect. This constitutes a final agency action within the meaning of the APA because it marks the consummation of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

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212. In addition, the Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President is required under the Memorandum, and thus the fact that the Secretary will take these actions is indisputable and inevitable. The Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President are separate final agency actions within the meaning of the APA. Requiring Plaintiffs to challenge those mandated final actions after they occur could enable Defendants to evade judicial review.

213. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

214. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum also violates the APA because it is contrary to statutory and constitutional law. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

215. The Census Act requires that this decennial census result in a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" to be reported to the President. 13 U.S.C. § 141(b). This statute has identical meaning as the Constitution, whose mandate it implements: undocumented immigrants are included in the "total population" of each state, and thus must be included in the Census. The statute governing reapportionment, 2 U.S.C. § 2a, provides that after within one week of the first day of the first regular

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session of each Congress following the Census – that is, after receiving the Secretary of Commerce's report pursuant to 13 U.S.C. § 141(b) – the President shall transmit to Congress the population of each state and the number of seats to which it is entitled in the House of Representatives. Like the Census Act, this statute implements the Constitution's requirement that apportionment be based on the total population of each state by mandating that the President's statement to Congress show "the whole number of persons in each State . . . ." 2 U.S.C. § 2a(a). Undocumented immigrants are included within the "whole number of persons in each State" as used in 2 U.S.C. § 2a(a).

216. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because: it relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; and offered an explanation for its decision that runs counter to the evidence before the agency. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

217. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because it changed long-standing, consistent Census Bureau policy without a "reasoned analysis of the change." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

218. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the

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Memorandum is also arbitrary and capricious in violation of the APA because it is the subject of improper political influence and pressure from political actors. *D.C. Fed'n of Civic Assoc. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

219. The Memorandum further violates the APA by effectively abrogating the Residence Rule without going through notice-and-comment rulemaking. The Census Bureau issued the Residence Rule pursuant to notice-and-comment rulemaking. The Census Bureau provided in the Residence Rule that foreign citizens must be "[c]ounted at the U.S. residence where they live and sleep most of the time," 83 Fed. Reg. at 5533, and the Census Bureau confirmed that "[a]pportionment is based on the resident population" as calculated pursuant to the Residence Rule. 83 Fed. Reg. at 5526 n.1. The APA's notice-and-comment requirements prohibit the Census Bureau from calculating the total population of each state in a manner different from that set forth in the Residence Rule without revising or replacing the Residence Rule pursuant to notice-and-comment rulemaking. Neither the President nor the Secretary of Commerce may order the Census Bureau to violate a rule issued pursuant to notice-and-comment rulemaking. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations, Inc.*, 556 U.S. 502.

220. Defendants' violations of the APA will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would

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otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

221. Defendants' violations of the APA also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

222. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

i. Declare that Defendants' exclusion of undocumented immigrants from (a) the tabulation of the total population of the states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states, is unauthorized by and violates the Constitution and laws of the United States;

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ii. Declare that Defendants' exclusion of undocumented immigrants is *ultra vires* and violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)-(b);

iii. Preliminarily and permanently enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

iv. Estop Defendants from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

v. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report the total population of each state under 13 U.S.C § 141(b) based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

vi. Issue a writ of mandamus compelling the President to calculate the whole number of persons in each state and the apportionment of the House of Representatives among the states based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

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vii. Issue a writ of mandamus compelling the President to calculate the apportionment of the House of Representatives among the states based on the method of equal proportions prescribed by Congress;

viii. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

ix. Award any other such additional relief as the Court deems proper.

Dated: July 24, 2020

Respectfully submitted,

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** Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R. 49(c)(3).

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Subject: RE: New Census related Complaints
Attachments: 1_20cv2023 Common Cause Et Al V. Trump Et Al Complaint.pdf; NYIC Complaint.pdf; New York Case.pdf

Director Dillingham, et al., this is to inform you of three Census related complaints recently filed against the Department related to the Presidential Memorandum dated July 21, 2020.

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b(5) - AC/WP/DP

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b(5) - AC/WP/DP

Please let me know if you have any questions.

Best,

Mike

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UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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

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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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, MAKE THE ROAD NEW YORK, CASA, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, FIEL HOUSTON INC. Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau, Defendants.	Civil Action No.

COMPLAINT

1. This action challenges President Trump's lawless attempt to exclude undocumented immigrants from the "persons" who must be counted in the Census for purposes of apportioning congressional seats to states. This xenophobic effort to deny the basic humanity of undocumented immigrants violates Article I's mandate to count all "persons" in the Census, and the Fourteenth Amendment's requirement that

"Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State . . . ." (emphasis added). These words leave no room for doubt: they expressly mandate counting "the whole number of persons" living in the United States for purposes of congressional apportionment. As the Supreme Court held just four years ago, "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including all non-citizens living in the United States, regardless of legal status. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016).

2. Despite this exceedingly clear constitutional command and binding Supreme Court precedent, on July 21, 2020, Defendant Trump issued a Presidential Memorandum addressed to Defendant Commerce Secretary Wilbur Ross titled, "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"). The Memorandum purports to declare—for the first time in our nation's history—that it is "the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.)." In other words, the Memorandum directs Secretary Ross: do not count undocumented immigrants at all for purposes of congressional apportionment.[1]

[1] The Memorandum appears to potentially exclude both those with no form of status whatsoever as well as those currently authorized to remain and work in the U.S., such as holders of Deferred Action for Childhood Arrivals, who are nonetheless not "in lawful status under the Immigration and Nationality Act." See *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 487 (9th Cir. 2018) ("recipients of deferred action enjoy no formal immigration status") (quotations omitted), *rev'd in part, vacated in part sub nom Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412

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3. Rarely does any government actor, much less the President of the United States, so openly and obviously violate the Constitution. The Fourteenth Amendment mandates "counting the whole number of persons" for congressional apportionment. As the Supreme Court reaffirmed nearly four decades ago, an undocumented individual living in the United States "is surely 'a person' in any ordinary sense of that term," "[w]hatever his status under the immigration laws." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The President cannot change the fact that undocumented individuals are human beings.

4. The new "policy" also breaks an uninterrupted line of history: every Decennial Census in our nation's history has included every person who lives in the United States, regardless of citizenship or immigration status, for purposes of apportioning congressional representation. Defendant Trump's new policy set forth in the Memorandum therefore not only violates the plain and unequivocal text of Section 2 of the Fourteenth Amendment and related Supreme Court precedent, it also departs from hundreds of years of consistent Census practice.

5. In addition to contravening the plain text of the Constitution, Supreme Court precedent, and an unbroken line of historical practice, the policy conflicts with the Department of Justice's own longstanding position—asserted repeatedly over decades in litigation in courts around this country, including to this Court in 2018—that undocumented immigrants are "persons" who must be counted in the Decennial Census

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(E.D.N.Y. 2018) ("Deferred action does not . . . confer lawful immigration status"), *vacated and remanded sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). For the sake of consistency, Plaintiffs refer to all those excluded here as "undocumented."

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and apportionment calculations. The Administration's own lawyers have made clear that the policy is unconstitutional.

6. The new policy is a discriminatory attack on immigrants and immigrant communities, and particularly immigrant communities of color. It is intended to erase these individuals and communities, and to send the message that they do not count. Indeed, whereas the original Apportionment Clause in Article I, Section 2 infamously discounted enslaved Black Americans as three-fifths of a person for purposes of congressional apportionment, the Memorandum raises this numerical dehumanization to a new level: not three-fifths, but zero.

7. In practical terms, the policy will result in states such as California, Texas, and New York receiving fewer congressional districts and Electoral College votes, diluting the political power of the residents of these states. The policy will also deplete federal resources from states and localities with substantial immigrant populations. The policy is rank discrimination on the basis of national origin, race, and ethnicity in violation of the Equal Protection and Due Process guarantees of the Fifth Amendment.

8. The effects of the new policy will cascade beyond the exclusion of undocumented immigrants from the Census count. It is no coincidence that the Memorandum was unveiled shortly before the Census Bureau was scheduled to commence non-response follow up ("NRFU") field operations to identify persons who have not yet responded to the Census. The new policy of excluding undocumented immigrants from the Census conveys a xenophobic message aimed at suppressing Census participation from households containing immigrants and noncitizens. Unless enjoined, the policy undoubtedly will undermine the effectiveness of the Census Bureau's

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operations and deter members of immigrant communities—including undocumented immigrants, noncitizen immigrants with legal status, and United States citizens—from participating in the Census.

9. The new policy also violates a panoply of other constitutional and statutory prohibitions, including constitutional separation of powers, the Census Act, and the Administrative Procedure Act.

10. This is not Defendant Trump's first attempt to weaponize the Census to attack immigrant communities. Last year, the Supreme Court affirmed that the administration's effort to add a citizenship question to the 2020 Decennial Census would reduce Census responses among non-citizen households, and held that Defendant Ross's publicly-stated rationale—purportedly to help enforce the Voting Rights Act—was "contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66, 2575 (2019).

11. In issuing the Memorandum, Defendant Trump has now confessed the real reason behind that failed effort: to delete undocumented immigrants from the decennial enumeration altogether, and to exclude them categorically from the very concept of *personhood* in the Constitution. Among its many cynical motivations, the President's new policy is an obvious attempt to evade the consequences of the Supreme Court's decision and the permanent injunction issued by the district court in the citizenship question litigation. *See Dep't of Commerce*, 139 S. Ct. 2551; Order, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 634 (S.D.N.Y. July 16, 2019).

12. Plaintiffs therefore request declaratory, injunctive, and/or mandamus relief to prohibit Defendants from excluding undocumented immigrants from the population count used to apportion the House of Representatives.

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JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346(a), and 28 U.S.C. § 1361.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(e).

15. This Court has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

PARTIES

A. Plaintiffs

1. The New York Immigration Coalition

16. The New York Immigration Coalition ("NYIC") is an umbrella policy and advocacy organization for more than 200 groups in New York State, representing the collective interests of New York's diverse immigrant communities and organizations. It has its principal place of business at 131 West 33rd St, New York, NY 10001.

17. NYIC's mission is to unite immigrants, members, and allies so that all New Yorkers can thrive. It envisions a New York State that is stronger because all people are welcome, treated fairly, and given the chance to pursue their dreams. NYIC pursues solutions to advance the interests of New York's diverse immigrant communities and advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups. It seeks to build the power of immigrants and the organizations that serve them to ensure their sustainability, improve people's lives, and strengthen New York State.

18. NYIC's 200-plus members are dues-paying, 501(c)(3), nonprofit organizations that are committed to advancing work on immigrant justice, empowerment,

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and integration. NYIC's members are located throughout New York State and beyond. These member groups include grassroots community groups, social services providers, large-scale labor and academic institutions, and organizations working in economic, social, and racial justice. A number of NYIC's member organizations receive funding from a variety of local, state, and federal government sources to carry out social service, health, and education programs. Many of these organizations receive governmental funding that is directly tied to the Decennial Census.

19. New York is likely to lose at least one House seat during the post-2020 Decennial Census apportionment process as a result of the exclusion of undocumented immigrants from the apportionment base. NYIC member organizations will lose political power because of New York's loss of at least one seat in the House of Representatives.

20. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population. This will injure a number of NYIC's member organizations that receive funding to carry out social service, health, and education programs in these areas.

21. As an organization, NYIC has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, NYIC has and will continue to invest resources in Get Out the Count efforts through robust advocacy, outreach, and mass educational forums.

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22. The Census is ongoing, with the Census Bureau's NRFU just getting started.[2] NYIC plans to continue its Get Out the Count efforts during this NRFU. In its extensive Decennial Census outreach, NYIC will now face a much more difficult environment due to the perception among New York undocumented immigrants that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

23. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, NYIC will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to NYIC's Get Out the Count efforts will be diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, NYIC has already, and will continue to, divert resources from its other organizational priorities, including its work on health care

[2] U.S. Census Bureau, *2020 Census: Nonresponse Followup*, https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html (June 19, 2020).

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and language access issues, to address these concerns about decreased Census participation.

2. Make the Road New York

24. Plaintiff Make the Road New York ("Make the Road New York") is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains.

25. Make the Road New York's mission is to build the power of immigrant and working-class communities to achieve dignity and justice. To achieve this mission, they engage in four core strategies: Legal and Survival Services, Transformative Education, Community Organizing and Policy Innovation.

26. Make the Road New York has more than 22,000 members who reside in New York City, Long Island and Westchester County. These members lead multiple organizing committees across numerous issues and program areas of concern to the organization. Members take on leadership roles in the campaigns, determine priorities, and elect the representatives who comprise most of the Board of Directors.

27. The apportionment resulting from the exclusion of undocumented immigrants from the apportionment base will likely deprive New York of at least one seat in the House of Representatives, diminishing the political and voting power and influence, and thus injuring, Make the Road members who live in New York.

28. The exclusion of undocumented immigrants from the Census base count will very likely reduce the amount of federal funds that are distributed to states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population.

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29. Make the Road New York members include individuals who do not have lawful immigration status and as a result of the Memorandum will not be counted for apportionment of Congressional seats. Make the Road New York members also reside in states and localities where immigrant communities of color constitute significant portions of the population, including New York City and suburban areas outside of New York City. Its members in these jurisdictions rely on a number of government services whose funding is allocated based on population and demographics determined by the Decennial Census. This includes parents with children enrolled in Title I schools, and drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs.

30. Make the Road New York members will be deprived of funding to which they would be entitled by a more complete Census count.

31. One of the many Make the Road members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Perla Liberato. Ms. Liberato is a resident of Queens County, NY, where she works as a Youth Organizer. Because Ms. Liberato resides in New York State, she will lose political power because of her state's loss of representation in Congress.

32. Another Make the Road member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Yatziri Tovar. Ms. Tovar is a resident of Bronx County, NY, and works as a media specialist. Because Ms. Tovar resides in New York State, she will lose political power because of her state's loss of representation in Congress.

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33. Make the Road New York has an ongoing commitment to promoting engagement in the Decennial Census among its members and constituents. For the 2020 Decennial Census, Make the Road New York is engaged in outreach and education work and receiving outside funding to help support this work. This work includes, among other things, general education programs, workshops for members, and person-to-person outreach. Make the Road New York's Census outreach efforts have already contacted over 100,000 people and assisted over 7,500 people with completing the Census questionnaire.

34. Make the Road New York will now face a much more difficult environment due to its constituents' heightened fear of interacting with government workers, which will be increased by anti-immigrant actions such as the decision to exclude undocumented immigrants from the apportionment base. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

35. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, Make the Road New York will be forced to expend more resources on their Decennial Census outreach efforts to reduce the effect of this policy change on the response rate in the immigrant communities of color it serves.

36. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision

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to exclude undocumented immigrants from the apportionment base, Make the Road New York will need to divert resources from other areas critical to its mission including civic engagement and providing legal services.

3. CASA

37. Plaintiff CASA is a nonprofit membership organization headquartered in Langley Park, Maryland. It has offices in Maryland, Virginia and Pennsylvania. CASA is the largest membership-based immigrants' rights organization in the mid-Atlantic region, with more than 90,000 members.

38. CASA's mission is to create a more just society by increasing the power of and improving the quality of life in low-income immigrant communities. To advance this mission, CASA offers social, health, job training, employment, and legal services to immigrant communities. CASA serves nearly 20,000 people a year through its offices and provides support to additional clients over the phone and through email.

39. CASA as an organization receives governmental funding that is directly tied to the Decennial Census. Among other things, CASA receives Community Development Block Grant (CDBG) funds that are allocated based on population and demographics determined by the Decennial Census, including poverty levels. The exclusion of undocumented immigrants in the Census base count will very likely result in a lower percentage of CDBG funds allocated to the areas that CASA serves, and therefore CASA will receive fewer such funds.

40. CASA has an ongoing commitment to promote participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, CASA is participating in ongoing outreach and education work.

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41. CASA plans to continue its Get Out the Count efforts during the NRFU. But CASA's efforts will be undermined by the decision to exclude undocumented immigrants from the congressional apportionment because this will decrease participation among undocumented immigrants who will believe that they no longer need to complete the Census, and it will heighten fear of interacting with government workers among immigrant communities of color. This fear extends not only to undocumented immigrants but also to family members of undocumented immigrants, who will be concerned that participating in the Decennial Census might endanger their loved ones.

42. Because of the difficulties created by the decision to exclude undocumented immigrants from the Census count base, CASA will be forced to expend more resources on its Decennial Census outreach efforts to reduce the effect of this change in policy on the response rates in the immigrant communities of color it serves.

43. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the Census count base, CASA will need to divert resources from other areas critical to its mission, including job training and health outreach.

4. The American-Arab Anti-Discrimination Committee

44. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending and promoting the rights and liberties of Arab-Americans and other persons of Arab heritage. ADC is the largest American-Arab grassroots civil rights organization in the United States.

45. Founded in 1980 by former Senator James Abourezk, ADC's objectives include combating stereotypes and discrimination against and affecting the Arab-

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American community in the United States, serving as a public voice for the Arab-American community in the United States on domestic and foreign policy issues, and educating the American public in order to promote greater understanding of Arab history and culture. ADC advocates, educates, and organizes to defend and promote human rights and civil liberties of Arab-Americans and other persons of Arab heritage.

46. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California, New York, and Texas. Its members are also active through ADC's 28 local chapters and organizing committees, located in 20 states and the District of Columbia, including in Tucson and Phoenix, Arizona; Los Angeles and Orange County, California; Miami and Orlando, Florida; New York, New York; and Austin and Dallas, Texas.

47. ADC has members in states with significant populations of undocumented immigrants, such as Texas, New York, Florida, California, Arizona and Illinois. These states—particularly Arizona, California, New York, and Texas—are likely to lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. Many but not all of ADC's members in these states are U.S. citizens. The loss of political representation and political power will injure ADC's members in these states.

48. The exclusion of undocumented immigrants in the Census base count will reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian Americans, Arab Americans, and other immigrant communities of color constitute significant portions of the population. This will injure ADC members who

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reside in these areas, such as San Antonio and Houston, Texas and Miami-Dade, Broward, and Orange Counties, Florida, Kings County, New York, and Prince George's County, Maryland. For example, ADC has members in these jurisdictions with children enrolled in Title I schools and members who use the roads on a regular basis and thus depend in part on federal highway funds for their upkeep.

49. As an organization, ADC is committed to promoting participation in the Decennial Census among its members and constituents. For the 2020 Decennial Census, ADC has undertaken engagement work within the Arab-American community. For example, ADC is conducting training for Census enumerators, running advertisements encouraging participation, and holding a strategy symposium, among other activities. ADC plans to continue its Get Out the Count work through the Non-Response Follow-Up time period.

50. ADC faces a difficult environment due to increased fear of interacting with government workers among the Arab-American community, a fear that will be heightened now because of the decision to exclude undocumented immigrants from the apportionment. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants, who fear that participating in the Decennial Census might endanger their loved ones.

51. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment base, ADC will be forced to invest more resources in its Decennial Census outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

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52. Because of the need to increase the time and money spent on Decennial Census outreach caused by the decision to exclude undocumented immigrants from the apportionment base, ADC will need to divert resources from other areas critical to its mission, including organizing, issue advocacy efforts, and educational initiatives.

5. The ADC Research Institute

53. Plaintiff ADC Research Institute ("ADCRI") is a 501(c)(3) corporation founded in 1982 by former Senator James Abourezk. ADCRI sponsors public programs and initiatives in support of the constitutional and First Amendment rights of Arab-Americans, as well as research studies, publications, seminars, and conferences that document discrimination faced by Arab-Americans in the workplace, schools, media and government agencies. These programs also promote a better understanding of Arab cultural heritage by the public and policy makers.

54. ADCRI is currently engaged in promoting Decennial Census participation among its constituents. ADCRI plans to continue this work through NRFU time period.

55. ADCRI is now facing a much more difficult environment due to increased fear in the Arab-American community of interacting with government workers, due in part to anti-immigrant actions such as the exclusion of undocumented immigrants from the apportionment base. Because of this heightened fear and suspicion, ADCRI will be forced to invest more resources in its outreach efforts to reduce the effect of this policy change on the response rates in the communities it serves.

56. Because of the need to increase the time and money spent on Decennial Census outreach due to the decision to exclude undocumented immigrants from the apportionment base, ADCRI will need to divert resources from other areas critical to its

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mission, including its engagement with public school teachers and other educational issues

6. FIEL Houton Inc.

57. FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. FIEL is an immigrant-led organization who advocates for just laws for immigrant youth, their families, access to higher education for all people regardless of immigration status and access to justice for the community.

58. FIEL provides resources for undocumented students, understanding the path to college is unsteady for many first and even second-generation Americans. FIEL's office is open to anyone seeking guidance in their process of obtaining a higher education, including assistance with applying to college and applying for scholarships and other financial aid. FIEL also provides a variety of immigration services for our community—from providing legal counsel for immigrants to begin their pathway to citizenship to handling most immigration cases.

59. FIEL was born out of the need for civic engagement in support of undocumented students seeking a higher education and conducts organizing for the betterment of the communities they serve, including outreach and campaigns related to the 2020 Decennial Census directed at immigrant communities in Texas.

60. Today, FIEL has approximately 11,000 members in the greater Houston area who help lead FIEL's organizing. FIEL members reside in parts of Texas where immigrant communities of color constitute significant portions of the population, including Harris County.

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61. Texas would lose at least one House seat (or not gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process, as a result of the exclusion of undocumented immigrants from the apportionment base. The loss of political representation and political power will therefore injure FIEL's many members who live in Texas

62. FIEL members in Houston rely on a number of government services whose funding is allocated based on population and demographics determined by the decennial Census. This includes parents with children enrolled in Title I schools, drivers who use the roads on a daily basis and thus depend on federal highway funds to perform their jobs, and many other programs and facilities that receive Census-guided funding. FIEL members will be deprived of the benefits of census-guided funding to which they would be entitled by a more complete census count.

63. One of the many FIEL members who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Deyanira Palacios. Ms. Palacios is a lawful permanent resident and a resident of Montgomery County, Texas. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives.

64. Another FIEL member who will suffer injury due to the exclusion of undocumented immigrants from the apportionment base is Karen Ramos. Ms. Ramos is a resident of Harris County, Texas, where she works as a realtor. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives. Ms. Ramos is entitled to remain and work lawfully in the United States through the Deferred Action for Childhood Arrivals ("DACA")

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Program. She is entitled to be counted in the ongoing 2020 Decennial Census along with all other residents of Texas, regardless of their immigration status.

65. The exclusion of undocumented immigrants from the census base count will very likely reduce the amount of federal funds that are distributed to the states and localities where Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color constitute significant portions of the population, including Texas. This will injure FIEL and its members who benefit from census-guiding funding to carry out social service, health, and education programs in these areas.

66. As an organization, FIEL has an ongoing commitment to promoting engagement in the Decennial Census among individuals served by its member organizations. For the 2020 Decennial Census, FIEL has and will continue to invest resources in Get Out the Count efforts.

67. The Census is ongoing, with the Census Bureau's Non-Response Follow-Up just getting started. FIEL plans to continue its Get Out the Count efforts during this Non-Response Follow-Up. In its extensive Decennial Census outreach, FIEL will now face a more difficult environment due to the perception among undocumented immigrants in Texas that they no longer need to complete the Census now that undocumented immigrants are being excluded from the apportionment, as well as immigrant communities' heightened fear of interacting with government workers that this new policy will cause. This fear extends not only to undocumented immigrants, but also to family and household members of undocumented immigrants who will be concerned that participating might endanger their loved ones.

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68. Because of the heightened fear and suspicion created by the decision to exclude undocumented immigrants from the apportionment count, as well as confusion among undocumented communities about whether they need to or should fill out the Census in light of the Memorandum, FIEL will be forced to expend additional resources on their outreach efforts to try to reduce the negative impact of the Memorandum on the response rate in the immigrant communities they serve, particularly to undocumented immigrant communities. Staff time and other resources devoted to FIEL's Get Out the Count efforts will diverted to communications to combat fear and disinformation resulting from the Memorandum. Moreover, FIEL has already, and will continue to, divert resources from its other organizational priorities, including its work on access to education for students, to address these concerns about decreased census participation within immigrant communities.

69. Because of the need to increase the time and money spent on Decennial Census outreach due to the fear and confusion generated by the Administration's decision to exclude undocumented immigrants from the apportionment base, FIEL will need to divert resources from other areas critical to its mission such as other civic engagement activities.

B. Defendants

70. Defendant Donald J. Trump is the President of the United States. In that capacity, Defendant Trump issued a July 21, 2020 Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, described *infra*. As President, he has the statutory responsibility of transmitting to Congress "a statement showing *the whole number of persons* in each State, excluding Indians not taxed, as

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ascertained under the seventeenth and each subsequent decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a (emphasis added). He is sued in his official capacity.

71. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Decennial Census. 13 U.S.C. § 4.

72. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He oversees the Bureau of the Census ("Census Bureau") and is thus responsible for conducting the Decennial Census of the population. 13 U.S.C. § 141(a). He has statutory responsibility to "take a decennial census of the population," 13 U.S.C. § 141(a), and for reporting to the President by January 1, 2021, a "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). He is sued in his official capacity.

73. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency responsible for planning and administering the Decennial Census.

74. Defendant Steven Dillingham is the Director of the Census Bureau and thus has responsibility for administering a complete count of all persons residing in the United States, including for the purpose of providing that figure to the Secretary of Commerce for transmission to the President. He is sued in his official capacity.

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FACTS

A. Background on the Decennial Census

1. The Constitutional Command to Include All People in the Census for Purposes of Congressional Apportionment

75. The Constitution requires a Decennial Census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers" (the Apportionment Clause). U.S. Const. art. I, § 2, cl. 3. It also directs that "[t]he 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" (the Census Clause). *Id.*

76. Key here, Section 2 of the Fourteenth Amendment provides 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." *Id.* amend. XIV, § 2 (emphasis added).

77. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count *every single person* residing in the United States, whether citizen or noncitizen, *whether living here with legal status or without*," and "[t]he population count derived from that effort is used . . . to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019) (emphases added).

78. Consistent with this express constitutional mandate, the federal government has conducted a Census that includes all persons living in the United States, regardless of citizenship or legal status, every ten years since 1790.

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79. This was historically subject to only two qualifications, both contained in the explicit text of the Constitution: "Indians not taxed," and the Three-Fifths Clause for persons who were enslaved. The first exception has not been relevant for some time; the second, the Three-Fifths Clause, assumed that enslaved persons would be included in the Census, but provided that they would not be counted as full persons for the purposes of calculating population for congressional apportionment.

80. The explicit nature of these two qualifications, neither of which applies in modern times, reinforces that the Decennial Census and the resulting apportionment base must include every person physically living in the United States.

81. The Civil War and the abolition of slavery repudiated the Three-Fifths Clause, which the Fourteenth Amendment then repealed. During debates over the Reconstruction Amendments, Congress considered, and affirmatively rejected, proposals that would have altered Congressional apportionment to be based on the population of voters, rather than total population. Thaddeus Stevens introduced a constitutional amendment that would have apportioned House seats "according to their respective legal voters." *Evenwel*, 136 S. Ct. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 10 (1866)). Congress rejected that proposal. *Id.*

82. As ratified, Section 2 of the Fourteenth Amendment carried forward the basic total population mandate of the Apportionment Clause, providing, as stated, 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."

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83. In introducing this final language on the Senate Floor, Senator Jacob Howard explained the provision as follows:

> [The] basis of representation is numbers . . . that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime . . . . The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.

Evenwel, 136 S. at 1128 (quoting Cong. Globe, 39th Cong., 1st Sess., 2766-2767 (1866)).

84. In *Evenwel v. Abbott*, the Supreme Court held that Section 2 of the Fourteenth Amendment "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128. The proposition that non-citizens must be included in the population base for apportioning the total number of U.S. House seats to each state was central to the Court's holding that the Fourteenth Amendment does not prohibit states from including non-citizens in drawing legislative districts within a state. The Court explained: "It 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. The concurring Justices agreed that "House seats are apportioned based on total population." *Id.* at 1148 (Alito, J., concurring in the judgment); *see also id.* at 1138 (Thomas, J., concurring in the judgment) ("[F]eatures of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants."). *See also Wesberry v. Sanders*, 376 U.S. 1,

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14 (1964) (noting that the "principle solemnly embodied in the Great Compromise" is "equal representation in the House for equal numbers of people").

85. Lower courts have similarly recognized that the Constitution requires that all people be included in the population totals used for Congressional apportionment, regardless of citizenship status. As a three-judge panel of the District Court for the District of Columbia explained:

> The language of the Constitution is not ambiguous. It requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons." By making express provision for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all- inclusive. . . We see little on which to base a conclusion that illegal aliens should now be excluded, simply because persons with their legal status were not an element of our population at the time our Constitution was written.

Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 576 (D.D.C. 1980); *see also, e.g.*, *New York*, 351 F. Supp. 3d at 514.

2. *The Government's Repeated Acknowledgment of Its Constitutional Obligation to Include All People in the Census for Purposes of Congressional Apportionment*

86. The Justice Department has likewise not only conceded but forcefully argued that it has a constitutional obligation to count every person residing in the United States no matter their immigration status, and to use that data for apportionment purposes.

87. Facing a legal challenge in the early 1980s to the inclusion of undocumented immigrants in apportionment figures in *Federation for American Immigration Reform v. Klutznick*, the Government argued that the plaintiffs there sought "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."

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Defs.' Post-Arg. Memo. at 1, No. 79-3269 (D.D.C. Feb. 15, 1980). It explained that the "Constitution expressly requires the enumeration of the 'whole number of persons in each State' for purposes of apportionment of Representatives to the United States Congress and none of plaintiffs' legal theories puts in doubt that the plain meaning of this language must be given effect," and that the Census "has never . . . excluded from the apportionment base any inhabitant counted in the decennial census." Defs.' Reply Memo. & Opp'n to Pls.' Mot. for Summ. J. at 1, No. 79-3269 (D.D.C. Jan. 30, 1980).

88. The Government also rejected any policy rationale for overriding the constitutional mandate to include all persons in the enumeration for purposes of congressional apportionment, noting that the "constitutionally mandated requirement to count states' inhabitants for apportionment purposes is a matter separate from the need to solve the problems of illegal immigration." *Id.*

89. Similarly, in a September 22, 1989 letter, Carol Crawford, the Assistant Attorney General for Legislative Affairs, advised Senator Jeff Bingaman that the Justice Department had "found no basis" for reversing its existing position that the Census Clause and Section 2 of the Fourteenth Amendment "require that inhabitants of States who are illegal aliens be included in the census count."[3]

90. More recently, in *New York v. Department of Commerce*, the Government argued in its Motion to Dismiss that the "Constitution supplies a simple judicial standard for determining the constitutionality of [Census Bureau] practices—the Secretary must perform a person-by-person headcount, rather than an estimate of population." Memo. of

[3] Letter from Assistant Attorney Gen. Carol T. Crawford to Honorable Jeff Bingaman (Sept. 22, 1989), *in* 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989).

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Law in Support of Defs.' Mot. to Dismiss at 25, No. 1:18-cv-02921, ECF No. 155 (S.D.N.Y. May 25, 2018). Similarly, it contended that "where, as here, there is no allegation that the Secretary failed to establish procedures for counting every person, a case ceases to implicate 'actual Enumeration . . . .'" Reply Memo. of Law in Further Support of Defs.' Mot. to Dismiss at 7, No. 1:18-cv-02921, ECF No. 190 (S.D.N.Y. July 13, 2018).

91. The Government embraced the requirement that every person living in the United States must be included in the Census even more directly in its Post-Trial Proposed Findings of Fact in *New York v. Department of Commerce*, writing that the "Constitution requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Pls.' Claims at 1, No. 1:18-cv-02921, ECF No. 546 (S.D.N.Y. Nov. 21, 2018) (internal citations omitted).

92. Even more recently, in ongoing litigation in Alabama over the inclusion of undocumented immigrants in the Census, the Government argued that "[t]he very purpose of the census . . . is to count the number of people residing in each state." Memo. of Law in Support of Defs.' Mot. to Dismiss at 1, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772, ECF No. 45-1 (N.D. Ala. Nov. 13, 2019).

3. The Statutory Requirements to Include All People in the Census for Purposes of Congressional Apportionment

93. Article I, Section 2 of the Constitution provides that the Census may be conducted "in such manner as [Congress] shall direct by law." Congress has codified this

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command in a statutory scheme primarily contained in Title 13 of the United States Code, also known as the Census Act.

94. Congress delegated to the Secretary of Commerce responsibility for conducting the Census, providing that he "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date' . . . ." 13 U.S.C. § 141(a).

95. Congress has also created the Census Bureau within the Department of Commerce and authorized the Secretary of Commerce to delegate his duties under the Census Act to the Census Bureau. 13 U.S.C. §§ 2, 4.

96. The Secretary must report to the President a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" within nine months of the Census date. 13 U.S.C. § 141(b).

97. The President then performs a "ministerial" calculation of the number of U.S. House seats to which each state is entitled. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). The President is "require[d]" to use only "data from the decennial census" to perform this calculation, *id.* at 797, and the calculation must use a specific formula with "rigid specifications . . . provided by Congress itself, and to which there can be but one mathematical answer." *Id.* at 799 (quoting S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5).

98. The President must then transmit to Congress, "[o]n the first day, or within one week thereafter, of the first regular session . . . a statement showing *the whole number of persons* in each State . . . as ascertained under the . . . decennial census of the population," and "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives *by the method*

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known as the method of equal proportions." 2 U.S.C. § 2a (emphases added). The "method of equal proportions" is the specific formula prescribed by Congress that calculates the number of House seats for each state based on the total population of each state as enumerated in the Decennial Census.

99. Though the primary purpose of the Census enumeration remains the apportionment of Congressional seats (as well as, by extension, Presidential electors), the population count from the Decennial Census is also used by the states for decennial redistricting of state legislative districts; helps to determine the distribution of hundreds of billions of dollars of federal funding; and informs the decisions of federal, state, and local policymakers and private businesses.

4. The Census Bureau's Repeated Acknowledgments that All People Must Be Included in the 2020 Census for Purposes of Congressional Apportionment

100. After more than a decade of preparation, the 2020 Census is currently being conducted, with "Census Day" having occurred on April 1. Beginning in January in some places, and in March nationwide, Americans were asked to respond to the Census questionnaire online, by phone, or by mail. And while there have been some delays due to the COVID-19 pandemic, in-person NRFU is currently scheduled to take place between August 11 and October 31.[4]

101. Throughout the entire process of preparing for and conducting the 2020 Census, the Census Bureau has consistently represented that it would adhere to the

[4] *See* Census Bureau, *Overall Timeline*, https://2020census.gov/en/important-dates.html (last visited July 21, 2020).

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centuries-old practice of counting every person living in the United States—including undocumented immigrants—for apportionment and other purposes.

102. In fact, the Census Bureau has formally adopted a rule—pursuant to a notice-and-comment rulemaking process—that undocumented immigrants must be counted where they live and included in apportionment numbers. On February 8, 2018, the Census Bureau promulgated its "Residence Rule" for the 2020 Census, which lays out this requirement. 83 Fed. Reg. 5525 (Feb. 8, 2018) (formally titled "Final 2020 Census Residence Criteria and Residence Situations.").

103. The Residence Rule explains that the "residence criteria" are "used to determine where people are counted during each decennial census." *Id.* at 5526. The Residence Rule indicates that the criteria for determining residency set forth in the rule must then be used "to apportion the seats in the U.S. House of Representatives among the states" and that "[a]pportionment is based on the resident population, plus a count of overseas federal employees, for each of the 50 states." *Id.* at 5526 n.1.

104. The Residence Rule provides that "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The Census Bureau elaborated that the "Census Bureau is committed to counting every person in the 2020 Census," including citizens of foreign countries living in the United States. *Id.* at 5526. The Census Bureau considered a comment which "expressed concern about the impact of including undocumented people

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in the population counts for redistricting because these people cannot vote."[5] In response, the Census Bureau declined to make any changes to its residence criteria and indicated that it "will retain the proposed residence situation guidance for foreign citizens in the United States." *Id.* at 5530.

105. As of July 21, 2020, a copy of these criteria was available unchanged on the Census Bureau website, including the provision for foreign citizens:[6]

3. **FOREIGN CITIZENS IN THE UNITED STATES**
   a) ***Citizens of foreign countries living in the United States*** - Counted at the U.S. residence where they live and sleep most of the time.
   b) ***Citizens of foreign countries living in the United States who are members of the diplomatic community*** - Counted at the embassy, consulate, United Nations' facility, or other residences where diplomats live.
   c) ***Citizens of foreign countries visiting the United States, such as on a vacation or business trip*** - Not counted in the census.

106. As of July 21, 2020, a webpage maintained by the Census Bureau addressing "Frequently Asked Questions on Congressional Apportionment" noted that resident population counts "include all people (citizens and non-citizens) who are living in the United States at the time of the census," and explicitly affirmed that undocumented residents must be included in the population totals used for Congressional apportionment:[7]

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[5] Final 2020 Census Residence Criteria and Residence Situations, Federal Register, Vol. 83, No. 27, Thursday, February 8, 2018, https://www.govinfo.gov/content/pkg/FR-2018-02-08/pdf/2018-02370.pdf (last visited July 21, 2020).

[6] Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States*, https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last visited July 21, 2020).

[7] Census Bureau, Frequently Asked Questions on Congressional Apportionment, https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q6 (last visited July 21, 2020).

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Who is included in the apportionment population counts?

The apportionment population count for each of the 50 states includes the state's total resident population (citizens and non-citizens) plus a count of the overseas federal employees (and dependents) who have that state listed as their home state in their employers' administrative records.

For details on who is counted (and where they are counted) in the 2020 Census, see the 2020 Census Residence Criteria and Residence Situations.

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Who is included in the resident population counts?

The resident population counts include all people (citizens and non-citizens) who are living in the United States at the time of the census. People are counted at their usual residence, which is the place where they live and sleep most of the time.

The resident population also includes military and civilian employees of the U.S. government who are deployed outside the United States (while stationed or assigned in the United States) and can be allocated to a usual residence address in the United States based on administrative records from the Department of Defense.

Are undocumented residents included in the apportionment population counts?

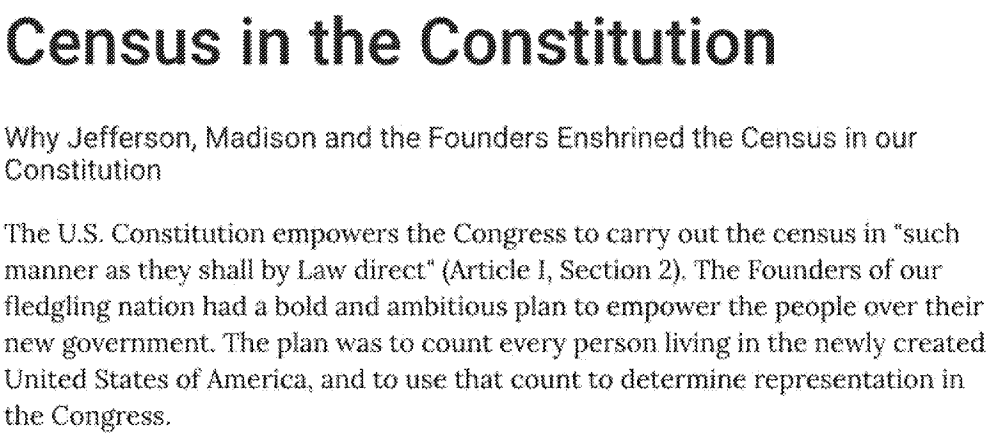
Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are included in the resident population for the census, which means they are all included in the apportionment counts.

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107. Likewise, as of July 21, the "Census in the Constitution" page on the Census Bureau website noted that "[t]he plan [of the Founders] was to count every person living in the United States of America, and to use that count to determine representation in Congress:"[8]

[8] Census Bureau, *Census in the Constitution*, https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html (last visited July 21, 2020).

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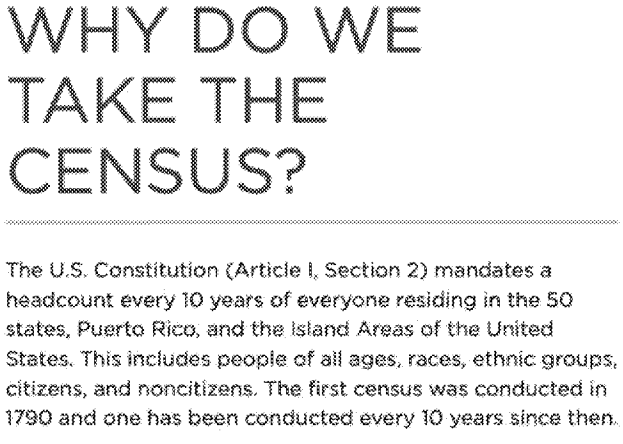


Census in the Constitution

Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution

The U.S. Constitution empowers the Congress to carry out the census in "such manner as they shall by Law direct" (Article I, Section 2). The Founders of our fledgling nation had a bold and ambitious plan to empower the people over their new government. The plan was to count every person living in the newly created United States of America, and to use that count to determine representation in the Congress.

108. Similarly, the Census Bureau's 2020 guide for Complete Count Committees, which are volunteer organizations designed to boost Census participation, advised that the Census "mandates a headcount every 10 years of everyone residing in the 50 states," including "citizens, and noncitizens:"[9]



WHY DO WE TAKE THE CENSUS?

The U.S. Constitution (Article I, Section 2) mandates a headcount every 10 years of everyone residing in the 50 states, Puerto Rico, and the Island Areas of the United States. This includes people of all ages, races, ethnic groups, citizens, and noncitizens. The first census was conducted in 1790 and one has been conducted every 10 years since then.

[9] Census Bureau, *2020 Census Complete Count Committee Guide* at 1 (2018), https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf (last visited July 21, 2020).

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109. Similarly, on its webpage "Setting the Record Straight," as of July 21, 2020, the Census Bureau assured readers that "[e]veryone counts" and that "everyone living" in the United States, including non-citizens, is counted in the 2020 Census:[10]

Setting the Record Straight

Does the 2020 Census ask about citizenship status?

NO. The 2020 Census does not ask whether you or anyone in your home is a U.S. citizen.

Are non-citizens counted in the census?

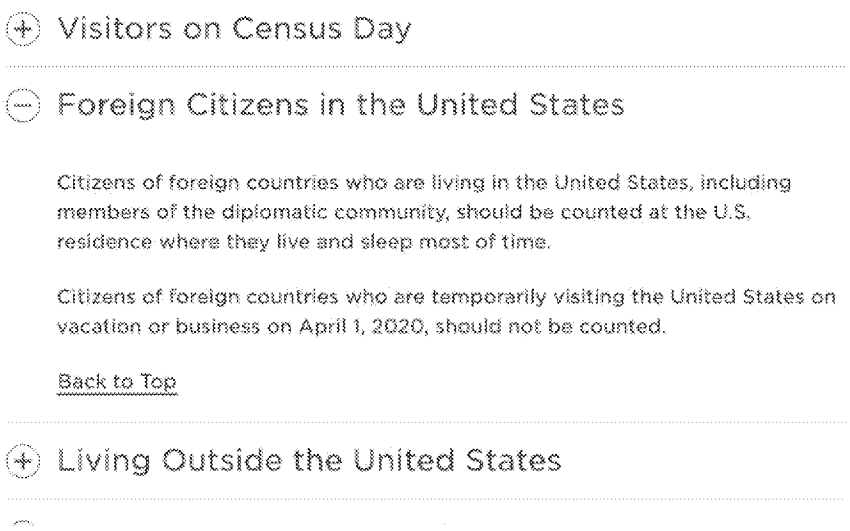
YES. Everyone counts. The 2020 Census counts everyone living in the country, including non-citizens. Learn more about who should be counted when you complete the 2020 Census.

110. As of July 21, the Bureau's "Who to Count" page repeated the same information:[11]

[10] Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html (last visited July 21, 2020).

[11] Census Bureau, *Who to Count*, https://2020census.gov/en/who-to-count.html (last visited July 21, 2020).

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111. And, as of July 21, the "Who Is Required to Respond" page on the Census Bureau's website for the 2020 Census also specified that "[e]veryone living in the United States . . . is required by law to be counted in the 2020 Census:"[12]



112. The 2020 Census is in process, but at this point remains far from enumerating the entire population. As of July 23, 2020, 62.3% of households in the United States have responded to the 2020 Census, according to the Census Bureau's estimates.[13] Included within this figure are likely significant numbers of undocumented immigrants who acted in good faith according to the Bureau's own instructions and

[12] Census Bureau, *Who Is Required to Respond*, https://2020census.gov/en/am-i-required.html (last visited July 21, 2020).

[13] Census Bureau, *Response Rates*, https://2020census.gov/en/response-rates.html (last visited July 21, 2020).

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responded to the census, with the understanding that they would be counted just like every other person living in the United States.

B. Defendants' First Attempt to Exclude Noncitizens from the Census: The Citizenship Question Litigation

113. This is not the first effort by Defendants to exclude noncitizens from the 2020 Census. Most notably, following the Secretary's March 2018 announcement that a citizenship question would be included on the Census, numerous plaintiffs, including Plaintiffs here, filed suit to block the question. After an eight-day bench trial, this Court issued a 277-page opinion and order including its findings of fact and conclusions of law. *See New York*, 351 F. Supp. 3d 502. The Court concluded that Plaintiffs had standing to sue because the inclusion of a citizenship question on the Census would deter participation in the Census by households with a noncitizen, leading to an undercount of such households, and that Defendants violated the Administrative Procedure Act in various ways, including by offering a "pretextual" rationale, *id.* at 516—Voting Rights Act ("VRA") enforcement—for the Secretary's decision. *Id.* at 516.

114. The Supreme Court affirmed, finding that the Secretary's VRA rationale was "incongruent with what the record reveal[ed] about the agency's priorities and decision-making process" and "contrived." *Dep't of Commerce*, 139 S. Ct. at 2575-76. The Secretary's March 2018 decision thus failed the basic requirement that agencies "pursue their goals reasonably," and was unlawful. *Id.* at 2576.

115. The Secretary's "contrived" pretext was pierced during discovery in a separate state court lawsuit, *Common Cause v. Lewis*, No. 18-CVS-14001 (N.C. Super. Ct.), where information that had been wrongfully concealed in discovery before this

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Court revealed the true genesis of the decision to add a citizenship question to the 2020 Census. The evidence was discovered on the hard drive of Dr. Thomas Hofeller, a North Carolina-based longtime Republican strategist and redistricting expert who died in August 2018.[14]

116. In late August 2015, Hofeller was commissioned by the Washington Free Beacon, a conservative website, to study the "practicality" and "political and demographic effects" of using citizen voting age population ("CVAP") instead of total population ("TPOP") to achieve equal population in redistricting.[15] Hofeller advised that if a citizenship question were added to the 2020 Decennial Census so as to enable the exclusion of non-citizens from the population base in redistricting, the results "would be advantageous to Republicans and Non-Hispanic Whites."[16]

117. Documents also revealed that Hofeller in 2015 communicated directly with Census Bureau official Christa Jones, using her private email address, and that Jones notified Hofeller of the Federal Register's notice for comment regarding the Census Bureau's Content Test for that year, suggesting that there was "an opportunity to mention citizenship."[17] Hofeller subsequently helped ghostwrite a draft DOJ letter to Commerce

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[14] Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times (Apr. 21, 2018) https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html.

[15] Pls.' Mot. for Order to Show Cause Ex. C at 1-2, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[16] Pls.' Mot. for Order to Show Cause Ex. D at 9, *New York v. Dep't of Commerce*, No. 18-CV-2921, ECF No. 595-1 (S.D.N.Y. May 31, 2019).

[17] Tara Bahrampour, *GOP strategist and census official discussed citizenship question, new documents filed by lawyers suggest*, Wash. Post (June 16, 2019), https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-

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requesting a citizenship question that subsequently came into the possession of his "good friend[]" Mark Neuman, Defendant Secretary Ross's "trusted" and "expert adviser" on census issues, who "act[ed] analogously to an agency employee."[18] Following a call between then-North Carolina Congressman (and now Defendant Trump's Chief of Staff) Mark Meadows and Defendant Secretary Ross, senior aides of Secretary Ross facilitated a meeting at which Neuman provided Hofeller's draft to John Gore, the Acting Assistant Attorney General for Civil Rights, who ultimately "requested" that the Bureau include a citizenship question on the census.[19] Meanwhile, Jones eventually came to serve as Chief of Staff to the Acting Director of the Census Bureau at the time of Defendant Secretary Ross's March 2018 Decision Memorandum ordering the inclusion of a citizenship question on the census. Jones later testified that Hofeller favored adding a citizenship question to the census to aid "the Republican redistricting effort" and that Hofeller's business partner, Dale Oldham, advocated for a citizenship question for redistricting and apportionment purposes "more times than I can remember."[20]

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connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/.

[18] NYIC Pls.' Mot for Sanctions, 1:18-cv-2921 (JMF), ECF No. 635-1 at 124-136; Def's Opp. to Ltr. Mot. to Compel, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 451 at 3 (S.D.N.Y. Oct. 30, 2018).

[19] Pls.' Joint Proposed Post-Trial Findings of Fact, *N.Y. Immigration Coalition v. U.S. Dep't of Commerce*, 1:18-cv-2921-JMF, ECF No. 545 at 52-53 ¶¶ 364-69 (S.D.N.Y. Nov. 21, 2018) (citing trial exhibits).

[20] Memorandum from Acting Chairwoman Carolyn B. Maloney to Members of the United States House Committee on Oversight, *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress*, 12 (Nov. 12, 2019) https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-11-12.Memo%20to%20COR%20Members%20re.%20Census.pdf.

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118. Subsequent statements by Defendant Trump and other Administration officials and advisors confirmed that a discriminatory intent to exclude noncitizens—and particularly, undocumented immigrants—from redistricting was the actual purpose of the effort to add a citizenship question to the Census.

119. For example, on July 1, 2020, Defendant Trump stated that a citizenship question was "very important to find out if someone is a citizen as opposed to an illegal," and that "Democrats want to treat the illegals, with healthcare and other things, better than they treat the citizens of this country."[21]

120. Defendant Trump himself has repeatedly admitted that his administration sought to add the citizenship question to harm immigrant communities by excluding them from the decennial enumeration and thus from redistricting and apportionment. About a week after the Supreme Court's holding in *Department of Commerce*, Defendant Trump, asked why he was still trying to get a citizenship question on the census, said: "Number one, you need it for Congress. You need it for Congress, for districting. You need it for appropriations. Where are the funds going? How many people are there?"[22]

121. Days later, at a press conference in the White House Rose Garden, Defendant Trump similarly stated that the citizenship information his administration sought is "relevant to administering our elections. Some states may want to draw state

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[21] *Remarks by President Trump at Signing of H.R. 3401*, White House (July 1, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/.

[22] Remarks by President Trump Before Marine One Departure, White House (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/).

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and local legislative districts based upon the voter-eligible population."[23] In particular, Defendant Trump urged states to apportion and redistrict on the basis of citizen voting age population instead of total population, as Hofeller had advised, because he suggested that the move might be immune from judicial scrutiny: "Indeed, the same day the Supreme Court handed down the census decision, it also said it would not review certain types of districting decisions, which could encourage states to make such decisions based on voter eligibility."[24]

122. At the same press conference, Defendant Trump stated: "As shocking as it may be, far-left Democrats in our country are determined to conceal the number of illegal aliens in our midst. They probably know the number is far greater, much higher than anyone would have believed before. Maybe that's why they fight so hard. This is part of a broader left-wing effort to erode the rights of the American citizen."[25]

123. Several of Defendant Trump's associates and agents also stated—in the wake of the Supreme Court's ruling in *Department of Commerce*—that excluding noncitizens from the census is necessary either to curtail immigration or limit the political power of immigrant communities of color.

124. Matt Schlapp, Chairman of the American Conservative Union and husband to Mercedes Schlapp, Defendant Trump's Director of Strategic Communications, tweeted on June 27, 2019 that he wanted to "impeach[] the Chief

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[23] *Remarks by President Trump on Citizenship and the Census*, White House (July 11, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[24] *Id.*

[25] *Id.*

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Justice [Roberts]" for "angling for vast numbers of illegal residents to help Dems hold Congress."[26]

125. Former Vice Chair of the President's Commission on Electoral Integrity and anti-immigrant zealot Kris Kobach stated on July 8, 2019 that he "advised the President on putting the citizenship question back on the U.S. Census," adding that he wanted to "make it a requirement in federal law that we must ask the question in every census going forward."[27] A supplement to the Administrative Record in the citizenship question litigation revealed that Secretary Ross (at the behest of former White House senior advisor Steve Bannon) had discussed adding a citizenship question with Kobach, who advised that the question's absence on the census "leads to the problem that aliens … are still counted for congressional apportionment purposes." In separate public statements, Kobach reiterated that the purpose of adding a citizenship question to the census was "so Congress [can] consider excluding illegal aliens from the apportionment process,"[28] because "citizens in a district with lots of illegal aliens have more voting power than citizens in districts with few illegal aliens."[29]

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[26] Matt Schlapp (@mschlapp),, Twitter (June 27, 2019, 8:29 AM), https://twitter.com/mschlapp/status/1144266564935528449.

[27] Pilar Pedraza (@PilarPedrazaTV), Twitter (July 8, 2019), https://twitter.com/PilarPedrazaTV/status/1148296658943381508.

[28] Kris Kobach, *Exclusive—Kobach: Bring the Citizenship Question Back to the Census*, Breitbart (Jan. 30, 2018), http://www.breitbart.com/big-government/2018/01/30/exclusive-kobach-bring-citizenship-question-back-census/.

[29] Kris Kobach, *Why the Citizenship Question is So Important*, Breitbart (June 27, 2019), https://www.breitbart.com/politics/2019/06/27/kobach-why-the-citizenship-question-is-so-important/.

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126. Defendant Trump has also repeatedly denigrated and dehumanized non-white immigrants. He has stated that certain immigrants "aren't people, these are animals,"[30] and his administration has housed immigrant children in cages and separated them from their families.[31] Indeed, Defendant Trump has long complained about the growth of immigrant communities of color, tweeting in 2015: "How crazy - 7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[32]

127. Secretary Ross has publicly supported the Trump Administration's anti-immigrant agenda, applauding Trump Administration programs to "swiftly return illegal entrants" and to "stop sanctuary cities, asylum abuse, and chain immigration."[33]

128. This slew of public statements and actions—from Defendant Trump and some of his highest-level advisers and administration officials—shows clearly that the true rationale for a adding a citizenship question is driven by racial animus against immigrants of color and a desire to curb the political power of immigrant communities of color.

C. The Presidential Memorandum to Exclude Undocumented Immigrants from the Census

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[30] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[31] BBC, *Trump migrant separation policy: Children 'in cages' in Texas*, June 18, 2018, BBC News, https://www.bbc.com/news/world-us-canada-44518942.

[32] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[33] Press Release, Commerce Dep't, Statement From U.S. Secretary of Commerce Wilbur Ross on the Release of President Trump's Immigration Priorities (Oct. 9, 2017), https://www.commerce.gov/news/press-releases/2017/10/statement-us-secretary-commerce-wilbur-ross-release-president-trumps.

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129. Where subterfuge has failed, Defendants have now turned to executive fiat. Barred from including a citizenship question on the 2020 Census, Defendants have now contrived a new scheme to identify and directly exclude undocumented immigrants from the Actual Enumeration required for apportionment. On July 21, 2020, Defendant Trump issued a presidential memorandum to the Secretary of Commerce entitled, "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census."[34]

130. The Memorandum wrongly asserts that "[t]he Constitution does not specifically define which persons must be included in the apportionment base," that "persons in each state" has been interpreted to mean "inhabitants," that the scope of the term "inhabitants" requires "the exercise of judgment," and that the President purportedly has discretion to exercise that judgment to exclude entire categories of persons who reside in the United States. *Id.*

131. On this asserted legal basis, the Memorandum declares that for reapportionment following the 2020 Census, "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Id.* § 2.

132. The Memorandum states that the Secretary, in submitting his Census report under 13 U.S.C. § 141(b), "shall take all appropriate action, consistent with the

[34] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/.

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Constitution and other applicable law" to provide information to the President to allow for the exclusion of undocumented immigrants. *Id.* § 3.

133. By its explicit and emphatic declaration of federal policy, the Memorandum directs the Commerce Department (and through the Commerce Department, the Census Bureau) to take steps to allow the President to exclude undocumented immigrants in his apportionment report to Congress issued under 2 U.S.C. § 2(a). *Id.* This includes, but is not limited to, "provid[ing] information" in the report that the Secretary must provide to the President under 13 U.S.C. § 141(b) that will "permit[] the President" to exclude undocumented immigrants in calculating the number of U.S. House seats to which each state is entitle. *Id.*

134. The Memorandum asserts that excluding undocumented immigrants is justified because "the principles of representative democracy" are undermined by tying the political influence of states to a population that includes undocumented immigrants. Memorandum, § 2.

135. In an accompanying statement, Defendant Trump declared that the Memorandum followed through on his commitment to determine the citizenship status of the population, and argued that "the radical left is trying to erase the existence of [the concept of American citizenship] and conceal the number of illegal aliens in our country" as "part of a broader left-wing effort to erode the rights of Americans [sic] citizens."[35] The statement repeated the Memorandum's argument that counting undocumented

[35] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

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immigrants creates "perverse incentives," and that "we should not give political power to people who should not be here at all."[36]

136. Upon information and belief, following receipt of the Memorandum, the Department of Commerce has issued directives to the Census Bureau, constituting final agency action, to implement the policy of excluding noncitizens from the enumeration used for congressional apportionment, as set forth in the Memorandum.

137. On June 23, 2020, Defendant Trump's re-election campaign sent an email making plain that the intent of the Memorandum is to undermine the Census and demonize immigrants. The email characterized the Memorandum as an "Executive Order" that "will block" undocumented people from "receiving congressional representation" and from "being counted in the U.S. Census."[37] The email claimed that this "Executive Order" was necessary because "Democrats are prioritizing dangerous, unlawful immigrants over American Citizens."[38]

D. The Effect of Excluding Undocumented Immigrants from the Census

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[36] *Id.*

[37] Hansi Lo Wang (@hansilowang), TWITTER (July 23, 2020, 3:34 PM), https://twitter.com/hansilowang/status/1286384297314844672.

[38] *Id. See also* Tara Bahrampour, *Trump's reelection campaign calls for adding citizenship question to 2020 census amid criticism that he is politicizing the count*, Wash. Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html (describing a "Trump reelection campaign" email that asked supporters whether they "support[ed] the president in adding a citizenship question" to the Census and noting that critics described the email as "demoralizing," "an assault on the constitution," and "a sly attempt to rally the president's base").

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138. Pew Research Center has estimated that the total population of undocumented immigrants in the United States was 10.5 million people in 2017.[39] The Department of Homeland Security (DHS) has estimated that the total population of undocumented immigrants in the United States was 12 million in 2015.[40]

139. California, Texas, and New York are consistently three of the states with the largest populations of undocumented residents.

140. According to Pew Research Center, California had 2 million undocumented residents, Texas had 1.6 million undocumented residents, and New York had 650,000 undocumented residents in 2017, subject to an upward or downward variance of 50,000 people for each estimate.[41]

141. According to DHS, California had 2.9 million undocumented residents, Texas had 1.9 million undocumented residents, and New York had 590,000 undocumented residents in 2015.[42]

142. The current average population of each U.S. House district is 710,767 people.

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[39] Jeffrey S. Passel and D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, Pew Research Ctr. (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.

[40] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[41] Passel and Cohn, *supra* note 38.

[42] Office of Immigration Statistics, *supra* note 46.

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143. The Memorandum expressly aims to alter Congressional apportionment based on states' undocumented populations. For example, it argues that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." Memorandum§ 2.

144. Of these states, the Memorandum specifically targets California, anticipating that excluding undocumented immigrants from the census would deprive California of multiple House seats (an thus, Electoral College votes). The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.* Upon information and belief, this "one State" is California.

145. Unlawfully excluding undocumented residents from the population count used for apportionment will likely deprive several states—most particularly, Arizona, California, New York, and Texas—of at least one House seat (or will cause not to gain at least one House seat they would have gained) during the post-2020 Decennial Census apportionment process.

146. Indeed, this Court found that Arizona, California, Florida, Illinois, New York, and Texas all faced a substantial certainty of losing a seat based on a differential undercount of 5.8% of all noncitizens in the 2020 census. *New York*, 351 F. Supp. 3d at 594, *aff'd in relevant part*, 139 S. Ct. 2551. The evidence upon which the Court based these findings—the testimony of Dr. Chris Warshaw—relied on smaller undercounts of

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noncitizens in each of these states than would be caused by the Memorandum. *See id.* (citing Warshaw Decl., Dkt. No. 526-1). A greater impact will occur for these states if ***100%*** of undocumented immigrants are removed from the apportionment count. Other studies have also confirmed the certainty that various states would lose a seat if undocumented residents are removed.[43]

147. But the effects of the Memorandum are likely to run even deeper. Like the failed effort to add a citizenship question to the census, the new policy of excluding undocumented immigrants from the census will broadcast a xenophobic message to immigrant communities about census participation, suppressing responses from households containing immigrants and noncitizens. This will result in the omission from the census not only of undocumented immigrants, but also noncitizen immigrants with legal status and United States citizens. The resulting undercount will harm the work of organizations—including that of the Plaintiffs here—in promoting census participation and will further strip representation and economic resources from communities with immigrant populations.

E. The Census Bureau's Likely Use of Statistical Modeling to Estimate the Undocumented Population

[43] *See* Amelia Thomson-DeVeaux, *The Citizenship Question Could Cost California And Texas A Seat In Congress*, FiveThirtyEight (June 17, 2019), https://fivethirtyeight.com/features/the-citizenship-question-could-cost-california-and-texas-a-seat-in-congress/ (finding California, Arizona, and Texas would lose at least one seat in a poorly conducted census and 10% of households with undocumented immigrants undercounted). While there are questions about the accuracy of its expert's methodology, the State of Alabama has asserted essentially the same thing in separate litigation. *See* Expert Report of Dudley Poston at 28, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-00772-RD (N.D. Ala.) (opining that excluding undocumented residents from apportionment base would cause California, Texas, and New Jersey to lose seats).

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148. The Census Bureau does not have a means to individually enumerate undocumented immigrants separate and apart from the rest of the population in each jurisdiction.

149. After completion of the citizenship question litigation, the Census Bureau indicated that it would seek to compile citizenship status information for Census respondents by using administrative records, including records from the Social Security Administration. Such administrative records, however, do not provide information as to *legal status*, as opposed to citizenship, and cannot be used to determine whether census respondents are *undocumented immigrants* specifically.

150. In fact, the Government has recently represented in separate litigation, via a declaration by Census Bureau Senior Advisor Enrique Lamas, that it "lack[s] . . . accurate estimates of the resident undocumented population" on a state-by-state basis.[44]

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[44] Defendants' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *State of Alabama v. Dep't of Commerce*, Case No. 2:18-cv-00772-RDP (N.D. Ala. March 13, 2020). *See also* Jeffrey Mervis, *Why the U.S. Census Bureau could have trouble complying with Trump's order to count citizens*, Science Mag. (Sept. 16, 2019), https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-trouble-complying-trump-s-order-count-citizens (detailing the "formidable challenge" in relying on administrative records); Comment from Campaign Legal Center, OMB Control Number 0607-0995, https://campaignlegal.org/sites/default/files/2020-01/Final%20Campaign%20Legal%20Center%20Comment%20OMB%20Control%20No%200607-0995.pdf (noting that "[s]tate administrative data on individual citizenship status are notoriously riddled with errors and outdated information" and "records misidentify naturalized U.S. citizens as non-U.S. citizens"); Jennifer Van Hook, *Counting 11 million undocumented immigrants is easier than Trump thinks*, The Conversation (July 17, 2019), https://theconversation.com/counting-11-million-undocumented-immigrants-is-easier-than-trump-thinks-120459 (observing that administrative records provide "inconsistent information about the same person," have "limited value for describing those who fall outside of the administrative records system," and will require researchers to "make assumptions about coverage error").

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151. In the absence of means to actually enumerate the total population of the United States minus undocumented immigrants, the Government has indicated its intention to use statistical modeling to estimate the undocumented population and thereby calculate an apportionment population that excludes undocumented immigrants. In separate litigation, Department of Justice attorney Stephen Ehrlich recently stated in a hearing that "there may need to be some statistical modeling" in order to carry out the Memorandum, though the Government had not yet "formulated a methodology."[45]

152. This statement is consistent with the previous efforts of governmental and non-governmental actors that have endeavored to project the population of undocumented immigrants in the United States. For example, Pew Research Center compiles statistical estimates of the population of undocumented immigrants rather than an actual enumeration, making a variety of statistical adjustments to the census population numbers and weighting the data.[46] DHS has similarly used statistical sampling methodology, the residual method, for estimated the populations of undocumented immigrants. [47]

153. The scope of any statistical model required to estimate the number of undocumented immigrants would be unprecedented for use in calculating the

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[45] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985

[46] *See*, J. Passel, *Measuring illegal immigration: How Pew Research Center counts unauthorized immigrants in the US* (July 12, 2019), https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/.

[47] Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf. DHS has not performed any estimates of the population of undocumented immigrants for any year since 2015.

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apportionment population. Such statistical processes are not an "actual Enumeration" as required under Article I of the Constitution. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338 (1999); *id.* at 346 (Scalia, J., concurring) ("It is in my view unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling.").

CAUSES OF ACTION

COUNT ONE
Violation of Enumeration and Apportionment (Article I, Section 2, Clause 3 of the Constitution, and Section 2 of the Fourteenth Amendment) (All Plaintiffs against All Defendants)

154. Plaintiffs repeat and re-allege by reference all of the previous allegations in this Complaint.

155. The Constitution requires that the apportionment of seats for the House of Representatives be conducted on the basis of the total population of all persons in each state, following each Decennial Census.

156. In particular, Article I, Section 2 of the Constitution requires 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," "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

157. Section 2 of the Fourteenth Amendment provides that "Representatives shall 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 (emphasis added).

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158. "Whatever his status under the immigration laws, an alien is . . . a 'person'" for purposes of the Fourteenth Amendment. *Plyler*, 457 U.S. at 210. A "person" means a "human being," *Black's Law Dictionary* (11th ed. 2019), and no matter what the Trump Administration may say, undocumented immigrants are human beings. Undocumented immigrants living in the United States are among the "whole number of persons in each State," U.S. Const. amend. XIV, § 2, and thus the plain and unequivocal text requires counting undocumented immigrants in the total population base used for Congressional apportionment.

159. The Supreme Court has definitively held that non-citizens must be included in the population base used to apportion U.S. House seats to each state. The Court held just four years ago that "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population," including non-citizens. *Evenwel*, 136 S. Ct. at 1129; *see also id.* at 1128 ("The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.").

160. Other courts, including this Court, have recognized the same. *See, e.g.*, *New York*, 351 F. Supp. 3d at 514 ("[T]he Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and "[t]he. population count derived from that effort is used . . . to apportion Representatives among the states"); *Klutznick*, 486 F. Supp. at 576 ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for

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apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'").

161. The Memorandum brazenly ignores this precedent and the plain text of the Constitution. It purports to unilaterally declare that undocumented immigrants are not "persons" under the Fourteenth Amendment. Based on that shocking and baseless assertion, the Memorandum declares it to be the explicit policy of the United States "to exclude from the apportionment base aliens who are not in a lawful immigration status." The Memorandum further directs the Secretary to provide the President with information in his Census report that excludes undocumented immigrants from the population count of each state, so as to permit the President to exclude such persons in reporting to Congress the number of each representatives to which each State is entitled, which the President will then do.

162. By denying undocumented immigrants are "persons" and excluding them from the total population count for congressional apportionment, the Memorandum violates the plain and straightforward command of the Enumeration Clause and the Fourteenth Amendment, as well as binding Supreme Court precedent.

163. The Memorandum further violates the Enumeration Clause and the Fourteenth Amendment by apportioning U.S. House seats among the states based on data other than the "numbers" reflecting the total population of each state as determined by the "actual Enumeration" of the Decennial Census.

164. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to each receive at least one fewer seat in

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the House of Representatives. Because these states will have at least one fewer congressional district than they would otherwise, each congressional district in these states will encompass more total people than it would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

165. Defendants' violations of the Enumeration Clause and the Fourteenth Amendments also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute substantial portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

166. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. at 2565–66; *Utah v. Evans*, 536 U.S. 452, 464 (2002); *U.S. House of Representatives*, 525 U.S. at 329–34.

COUNT TWO
Violation of Census Act
(2 U.S.C. § 2a(a); 13 U.S.C. § 141)
(*Ultra Vires*)

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167. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

168. Congress has required that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" 13 U.S.C. § 141(a). "The tabulation of total population by States under subsection (a) of [§ 141] *as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b) (emphasis added).

169. In turn, "the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and 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." 2 U.S.C. § 2a(a).

170. As the Supreme Court and the Census Bureau have recognized, these statutes require that persons whose "usual residence" is in the United States must be counted in the enumeration and apportionment of U.S. House seats at that "usual residence." "[T]he first census conducted in 1790 required that persons be allocated to their place of 'usual residence,'" and "'usual residence' has continued to hold broad connotations" through present day. *Franklin*, 505 U.S. at 803, 805. The Census Bureau has confirmed that its official policy today is that "[t]he state in which a person resides and the specific location within that state is determined in accordance with the concept of

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'usual residence,' which is defined by the Census Bureau as the place where a person lives and sleeps most of the time." Residence Rule, 83 Fed. Reg. at 5526.

171. Under the Census Bureau's Residence Rule, "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533.

172. The President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary of Commerce to tabulate and transmit reports to the President estimates of the total population in each State that are based on data other than the actual Enumeration of each state as determined by the decennial census, and that do not count all persons who live in the state as their "usual residence." Specifically, the President's Memorandum violates 13 U.S.C. § 141(a)–(b) by requiring the Secretary to rely on administrative data other than the actual Enumeration of each state as determined by the decennial census, and to exclude undocumented immigrants who reside in a state as their usual residence, in tabulating the total population of each state and transmitting those total population numbers to the President.

173. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by requiring the President to calculate and transmit to Congress total population figures for each state, and the apportionment of U.S. House seats among the states, based on data other than "decennial census of the population," and by using a method other than the "method of equal proportions" prescribed by Congress. 2 U.S.C. § 2a(a). The President may use only the actual enumeration of the total population of each State as "ascertained under the . . . decennial census"—and nothing else—to calculate the whole number of persons in each State and the number of Representatives for each state.

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2 U.S.C. § 2a(a). Likewise, the "method of equal proportions" is a "rigid" formula "provided by Congress itself" that requires use of the total population of each State as determined based on the decennial census and no other administrative data. *Franklin*, 505 U.S. at 2775.

174. The President's Memorandum also violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)–(b) by causing the President to transmit to Congress total population figures for each state that do not include all persons who live in each state as their "usual residence," and/or by causing the President to transmit to Congress a number of Representatives for each state that is calculated by excluding persons who live in each state as their "usual residence." If the Secretary of Commerce transmits one set of total population numbers to the President that *do* include undocumented immigrants who live in the United States as their usual residence (as the Secretary must do), then the President is required to use *that* set of total population numbers in transmitting to Congress "the whole number of persons in each State," and "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." 2 U.S.C. § 2a(a). The number of whole of persons in each state that the President must transmit to Congress must be that "ascertained under the . . . decennial census of the population," *id.*, which includes all persons living in the United States as their usual residence, 13 U.S.C. § 141(a)–(b). And it is "required for the apportionment of Representatives in Congress among the several States" that the President and the Secretary use the total population numbers tabulated for each state that include all persons who live in each state as their usual residence. 13 U.S.C. § 141(b).

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175. Because Defendant Trump and Secretary Ross will act beyond the scope of their statutory authority in a way that causes constitutional violations, they are acting *ultra vires* pursuant to 2 U.S.C. § 2a(a) and 13 U.S.C. § 141. *See, e.g.*, *Mountain States Legal Foundation v. Bush*, 306 F. 3d. 1132, 1136 (D.C. Cir. 2002) ("[T]he Supreme Court has indicated generally that review is available to ensure that Proclamations are consistent with constitutional principles and the President has not exceeded his statutory authority."); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority. . . . That the executive's action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

176. The Memorandum also will result in the President and Secretary Ross failing to perform their clear legal duties to, among other things: tabulate the total populations of the States based on data from the decennial census that includes all persons who live in the United States as their usual residence; calculate the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence; and transmit to Congress the whole number of persons in each state and the number of U.S. House seats to which each seat is entitled based on data from the decennial census that includes all persons who live in the United States as their usual residence.

177. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives.

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Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

178. Defendants' violations of 2 U.S.C. § 2a(a) and 13 U.S.C. § 141 also causes harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

179. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT THREE
Discrimination on the Basis of Race and National Origin
(Fifth and Fourteenth Amendments of the U.S. Constitution)
(All Plaintiffs against All Defendants)

180. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

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181. The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the federal government not deny people the equal protection of its laws and prohibits the federal government from discriminating against individuals in the United States on the basis of race, ethnicity, national origin, and citizenship. U.S. Const. amend V.

182. The Supreme Court has affirmed the clear text of the Fifth Amendment by recognizing its constitutional protections apply to "person[s]" within the jurisdiction of the United States, and not only to citizens. *See, e.g., Wong Wing v. United States,* 163 U.S. 228 (1896) (Field, J., concurring) ("[t]he term 'person,' used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic"); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993).

183. The Fifth Amendment's Due Process Clause "applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

184. The "bedrock protections of the Fifth Amendment's Due Process Clause" are not eliminated by the "mere act of entry into the United States without documentation." *Garza v. Hargan*, 874 F.3d 735, 737–38 (D.C. Cir. 2017) (Millett, J., concurring).

185. The Fifth Amendment's prohibition on discrimination on the basis of race, ethnicity, national origin, and citizenship is co-extensive with the Equal Protection guarantees of the Fourteenth Amendment, which the Supreme Court has long recognized extends to undocumented immigrants. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . [and is] universal in [its] application, to

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all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In more recent years, the Supreme Court has reaffirmed that "aliens whose presence in this country is unlawful . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210.

186. The Memorandum violates the Fifth Amendment's prohibition on discrimination in at least two distinct respects. First, it facially targets undocumented immigrants for exclusion from the decennial enumeration, outright denying them the status of "persons" under the Constitution. Government action denying the *personhood* of people living in the United States echoes the darkest chapters of American constitutional history. *See Dred Scott v. Sandford*, 60 U.S. 393 (1857).

187. Second, as with the failed scheme to include a citizenship question on the census, this latest discriminatory act is motivated by a bare desire to harm immigrant communities of color, and particularly Latinx communities, by reducing their political clout and access to federal resources.

188. Defendant Trump and nativist members of his Administration view non-white, undocumented immigrants as a political and cultural threat. The President, as noted *supra*, has directed particularly virulent animus at Latinx immigrants. Defendant Trump and members of his Administration have long warned about the consequences of rising Latinx political power in the United States and the ostensible harms of undocumented immigrants to the United States.

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189. The Memorandum not only would codify the animus and discriminatory goals of Defendants, but it would result in a cascade of discriminatory effects, including, but not limited to:

a. The loss of congressional seats and Electoral College votes in states where these groups constitute significant portions of the population and where Plaintiffs have members, including a certainly impending loss for California; a substantial risk of a loss for New York, Texas, Florida, Arizona, and Illinois; and a considerable risk of a loss for New Jersey and Georgia; and

b. A substantial reduction in the amount of federal funds distributed to the local and state governments in which the Plaintiffs reside, which all have significant, non-white populations; and

c. A reduction of the political influence to which these communities would receive through an accurate census count.

190. In addition to the discriminatory effects evidence well-known and acted upon by Defendants and the direct intent evidence outlined, the haphazard process through which the Defendants promulgated this Memorandum provides strong circumstantial evidence of discriminatory intent. This evidence includes the timing of the release of the Memorandum, which coincides with dispatching of Census field operations to conduct outreach to groups the Defendant Trump has discouraged from participating with dark and racist presidential campaign statements; the bizarre procedural sequence and series of events leading up to the Memorandum; the President's repeated efforts to generate confusion surrounding and distrust of the Census process; the shallow justifications cited by the President for the memorandum; the historical background and

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substantive departures from prior precedents; contemporary statements of the President and other decisionmakers; and the profound unworkability of the Memorandum.

191. Defendants' violations of the Fifth Amendment will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

192. Defendants' violations of the Fifth Amendment also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

193. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

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COUNT FOUR
Separation of Powers
(Article I, Section 2, Clause 3 of the Constitution, as amended by the Fourteenth Amendment)
(All Plaintiffs against Defendant Trump)

194. Plaintiffs repeat and re-allege the previous factual and jurisdictional allegations in this complaint.

195. Article I of the U.S. Constitution, in conjunction with the Fourteenth Amendment, requires that the federal government conduct an "actual Enumeration" of the national population every ten years to determine the "whole number of persons" in the United States and within each state for the purpose of apportioning members of the House of Representatives to the respective states according to their population. U.S. Const. art I, § 2, cl. 3; *id.* amend. XIV, § 2.

196. The Constitution, through the Enumeration Clause, "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Dep't of Commerce*, 139 S. Ct. at 2566 (quoting *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996)).

197. As the Supreme Court has noted repeatedly, through the Census Act, Congress "delegated to the *Secretary of Commerce* the tasks of conducting the decennial census 'in such form and content as he may determine,'"—not the President. *Id.* at 2567 (quoting 13 U.S.C. § 141(a)).

198. The text of the Census Act itself makes clear that Congress has delegated authority over the census to the *Commerce Secretary*, not the *President*.

199. Section 141(a) of the Census Act requires that "*[t]he Secretary shall*, in the year 1980 and every 10 years thereafter, take a decennial census of population as of

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the first day of April of such year, which date shall be known as the 'decennial census date', *in such form and content as he may determine*"—not the President. 13 U.S.C. § 141(a) (emphasis added).

200. Section 4 of the Census Act requires the Secretary, *not* the President, to "perform the functions and duties imposed upon him by this title." 13 U.S.C. § 4.

201. The Census Act plainly distinguishes between the Secretary and the President in their roles regarding the Census, as intended by Congress. *See, e.g.*, 13 U.S.C. § 141(b) ("The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported *by the Secretary to the President* of the United States.") (emphasis added); 13 U.S.C. § 21 (distinguishing between "the President" and "the Secretary").

202. The Constitution and Census Act thus make clear that the President has usurped powers Congress has delegated to the Secretary. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

203. The Constitution and Census Act are unambiguous: Congress has constitutional authority over the census, and it has delegated none of that authority to the President. The Memorandum therefore violates the Constitution's separation of powers.

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204. Defendants' constitutional violation causes ongoing harm to Plaintiffs and their members because as explained their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the populations; and provide services to undocumented immigrants, and as such, these violations will deprive them of the political influence and funding to which they would be entitled by a more accurate census.

205. The Supreme Court has stated, "An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Bond v. United States*, 564 U.S. 211, 222 (2011).

206. Defendants' violations of the constitutional separation of powers will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would other, each congressional district in these states will encompass more total people than they would otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy

207. Defendants' violations of the constitutional separation of powers also causes harm to Plaintiffs and their members because, as explained, some of their

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members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

208. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

COUNT FIVE
Administrative Procedure Act
(All Plaintiffs against Defendants Ross, Dillingham, Department of Commerce and Census Bureau)

209. Plaintiffs repeat and re-allege by reference all of the previous factual allegations in this Complaint.

210. The Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, provides for a cause of action against any final agency action, within the meaning of the APA.

211. Upon information and belief, the Department of Commerce has directed the Census Bureau to effectuate the Memorandum's policy of excluding noncitizens from the enumeration used to apportion congressional representation and has instructed the Census Bureau to that effect. This constitutes a final agency action within the meaning of the APA because it marks the consummation of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow, *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

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212. In addition, the Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President is required under the Memorandum, and thus the fact that the Secretary will take these actions is indisputable and inevitable. The Secretary's tabulation of total population numbers for each state that exclude undocumented immigrants and his transmission of those numbers to the President are separate final agency actions within the meaning of the APA. Requiring Plaintiffs to challenge those mandated final actions after they occur could enable Defendants to evade judicial review.

213. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

214. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum also violates the APA because it is contrary to statutory and constitutional law. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

215. The Census Act requires that this decennial census result in a "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States" to be reported to the President. 13 U.S.C. § 141(b). This statute has identical meaning as the Constitution, whose mandate it implements: undocumented immigrants are included in the "total population" of each state, and thus must be included in the Census. The statute governing reapportionment, 2 U.S.C. § 2a, provides that after within one week of the first day of the first regular

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session of each Congress following the Census – that is, after receiving the Secretary of Commerce's report pursuant to 13 U.S.C. § 141(b) – the President shall transmit to Congress the population of each state and the number of seats to which it is entitled in the House of Representatives. Like the Census Act, this statute implements the Constitution's requirement that apportionment be based on the total population of each state by mandating that the President's statement to Congress show "the whole number of persons in each State . . . ." 2 U.S.C. § 2a(a). Undocumented immigrants are included within the "whole number of persons in each State" as used in 2 U.S.C. § 2a(a).

216. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because: it relied on factors which Congress has not intended it to consider; entirely failed to consider an important aspect of the problem; and offered an explanation for its decision that runs counter to the evidence before the agency. *Dep't of Commerce*, 139 S. Ct. 2551 at 2569; *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43.

217. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the Memorandum is also arbitrary and capricious in violation of the APA because it changed long-standing, consistent Census Bureau policy without a "reasoned analysis of the change." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42-43; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

218. The Department of Commerce directive to the Census Bureau to effectuate the policy of excluding undocumented immigrants from the Census as set forth in the

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Memorandum is also arbitrary and capricious in violation of the APA because it is the subject of improper political influence and pressure from political actors. *D.C. Fed'n of Civic Assoc. v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971); *Tummino v. Torti*, 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

219. The Memorandum further violates the APA by effectively abrogating the Residence Rule without going through notice-and-comment rulemaking. The Census Bureau issued the Residence Rule pursuant to notice-and-comment rulemaking. The Census Bureau provided in the Residence Rule that foreign citizens must be "[c]ounted at the U.S. residence where they live and sleep most of the time," 83 Fed. Reg. at 5533, and the Census Bureau confirmed that "[a]pportionment is based on the resident population" as calculated pursuant to the Residence Rule. 83 Fed. Reg. at 5526 n.1. The APA's notice-and-comment requirements prohibit the Census Bureau from calculating the total population of each state in a manner different from that set forth in the Residence Rule without revising or replacing the Residence Rule pursuant to notice-and-comment rulemaking. Neither the President nor the Secretary of Commerce may order the Census Bureau to violate a rule issued pursuant to notice-and-comment rulemaking. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox Television Stations, Inc.*, 556 U.S. 502.

220. Defendants' violations of the APA will cause Plaintiffs and their members harm because it will cause New York, California, and Texas, among other states, to receive at least one fewer seat in the House of Representatives. Because these states will have at least one less congressional district than they would otherwise, each congressional district in these states will encompass more total people than they would

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otherwise, diluting the vote of residents of these states, such as Plaintiffs' members. The loss of a congressional seat will also result in fewer votes for each state in the Electoral College, reducing the political power of residents of these states. These injuries are directly traceable to the exclusion of undocumented immigrants as a result of the Memorandum and its policy.

221. Defendants' violations of the APA also cause harm to Plaintiffs and their members because, as explained, some of their members are undocumented immigrants and live in communities where undocumented immigrants constitute significant portions of the population; and Plaintiffs provide services to undocumented immigrants. The existence of an official policy to exclude undocumented immigrants from apportionment totals will cause fewer undocumented immigrants to respond to the Census, causing numerous injuries to the communities in which undocumented immigrants live, including loss of political power and funding.

222. There is a substantial likelihood that the requested relief will redress these injuries. *See Dep't of Commerce*, 139 S. Ct. at 2565-66; *Utah*, 536 U.S. at 464; *U.S. House of Representatives*, 525 U.S. at 329-34.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

i. Declare that Defendants' exclusion of undocumented immigrants from (a) the tabulation of the total population of the states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states, is unauthorized by and violates the Constitution and laws of the United States;

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ii. Declare that Defendants' exclusion of undocumented immigrants is *ultra vires* and violates 2 U.S.C. § 2a(a) and 13 U.S.C. § 141(a)-(b);

iii. Preliminarily and permanently enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

iv. Estop Defendants from excluding undocumented immigrants from: (a) the tabulation of total population by states; (b) the calculation and statement of the whole number of persons in each state; and (c) the calculation and statement of the apportionment of the House of Representatives among the states;

v. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report the total population of each state under 13 U.S.C § 141(b) based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

vi. Issue a writ of mandamus compelling the President to calculate the whole number of persons in each state and the apportionment of the House of Representatives among the states based only on the actual enumeration of the total population as determined by the decennial census, including undocumented immigrants who live in the United States as their usual residence;

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vii. Issue a writ of mandamus compelling the President to calculate the apportionment of the House of Representatives among the states based on the method of equal proportions prescribed by Congress;

viii. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

ix. Award any other such additional relief as the Court deems proper.

Dated: July 24, 2020

Respectfully submitted,

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BC-DOC-0000002102

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAI'I, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WASHINGTON; CITY OF CENTRAL FALLS, CITY OF CHICAGO, CITY OF COLUMBUS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PHOENIX, CITY OF PITTSBURGH, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CITY OF SEATTLE; CAMERON COUNTY, EL PASO COUNTY, HIDALGO COUNTY, and MONTEREY COUNTY,

Plaintiffs,

v.

DONALD J. TRUMP, *in his official capacity as President of the United States*; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., *in his official capacity as Secretary of Commerce*; BUREAU OF THE CENSUS; and

20 Civ. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BC-DOC-0000002103

STEVEN DILLINGHAM, *in his official capacity as Director of the United States Census Bureau*,

Defendants.

INTRODUCTION

1. This lawsuit challenges President Donald J. Trump's blatant disregard of an unambiguous constitutional command. The Fourteenth Amendment provides 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. The Framers of the Fourteenth Amendment deliberately chose the phrase "whole number of persons" to refer to *all persons living* in each State—including the "entire immigrant population not naturalized." Cong. Globe, 39th Cong., 1st Sess. 432 (1866) (Rep. John Bingham).

2. For 150 years—since the United States recognized the whole personhood of those formerly bound in slavery—the unambiguous requirement that all persons be counted for apportionment purposes, regardless of immigration status, has been respected by every executive official, every cabinet officer, and every President.

3. Until now. On July 21, 2020, President Trump issued a "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1). For the first time in our history, the Memorandum announces a "policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." *Id.* at 44,680. It directs the Secretary of Commerce to provide the President with information to carry out this policy. And it declares the

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President's intent to make a determination of the "whole number of persons in each State" that will in fact exclude the undocumented immigrants he has targeted throughout his administration.

4. The President's new policy and any actions Defendants take to implement it unequivocally violate the Fourteenth Amendment. The constitutional mandate to base apportionment on "the whole number of persons in each State" could hardly be clearer, and the Supreme Court has long recognized that undocumented immigrants are "persons" under the Fourteenth Amendment, *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Memorandum's open disregard of the Constitution's plain text is reason enough to invalidate it and to prevent Defendants from taking steps to carry out its unlawful policy.

5. But Defendants' decision to exclude undocumented immigrants from apportionment also violates the Constitution and federal statutes in multiple additional ways. Defendants' decision unlawfully discriminates against Hispanics and immigrant communities of color in violation of the Due Process Clause of the Fifth Amendment. By explicitly targeting and punishing States that refuse to assist in this administration's enforcement of federal immigration law, Defendants' decision violates the Tenth Amendment. And Defendants' decision to exclude undocumented immigrants from apportionment—as well as any action they take to implement or further that decision—is both contrary to law and arbitrary and capricious, in violation of the Administrative Procedure Act.

6. Defendants' decision harms Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests. If Defendants succeed in excluding undocumented immigrants from apportionment, some Plaintiffs will suffer severe injury to their most basic rights under our Constitution's representational form of government: they will improperly lose one or more Members in the House of Representatives and one or more corresponding electors in the

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Electoral College. And removing undocumented immigrants from the apportionment base will further harm Plaintiffs by, for example, undermining their ability to conduct congressional and state-level redistricting, depriving them of critical federal funding, and eroding the quality of census data on which they rely to perform essential government functions.

7. Plaintiffs the State of New York, State of Colorado, State of Connecticut, State of Delaware, District of Columbia, State of Hawai'i, State of Illinois, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, City of Central Falls, City of Chicago, City of Columbus, City of New York, City of Philadelphia, City of Phoenix, City of Pittsburgh, City of Providence, City and County of San Francisco, City of Seattle, Cameron County, El Paso County, Hidalgo County, and Monterey County therefore bring this action seeking declaratory and injunctive relief to hold Defendants to their obligation to base apportionment on "the whole number of persons in each State" and to forbid them from excluding undocumented immigrants—or any other person—from the apportionment base.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

9. Declaratory and injunctive relief is sought as authorized in 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs the State of New York and the City of New York are residents of this judicial district, and a

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substantial part of the events or omissions giving rise to this Complaint occurred and are continuing to occur within the Southern District of New York.

PARTIES

11. Plaintiff the State of New York, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is New York State's chief law enforcement officer and is authorized under N.Y. Executive Law § 63 to pursue this action.

12. Plaintiff the State of Colorado is a sovereign state of the United States of America. The State of Colorado brings this action by and through its Attorney General, Philip J. Weiser. The Attorney General has authority to represent the state, its departments, and its agencies, and "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party." Colo. Rev. Stat. § 24-31-101.

13. Plaintiff the State of Connecticut, represented by and through its Attorney General, William Tong, is a sovereign state of the United States of America. The Attorney General brings this action as the state's chief civil legal officer under Conn. Gen. Stat. § 3-124 *et seq*.

14. Plaintiff the State of Delaware is represented by and through its Attorney General Kathleen Jennings, and is a sovereign state of the United States of America. Attorney General Jennings is Delaware's chief law enforcement officer, *see* Del. Const., art. III, and is authorized to pursue this action under 29 Del. Code § 2504.

15. Plaintiff the District of Columbia is a municipal corporation empowered to sue and be sued, and is the local government for the territory constituting the permanent seat of the federal government. The District brings this case through the Attorney General for the District of Columbia, who is the chief legal officer for the District and possesses all powers afforded the

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Attorney General by the common and statutory law of the District. The Attorney General is responsible for upholding the public interest and has the authority to file civil actions in order to protect the public interest. D.C. Code § 1-301.81.

16. Plaintiff the State of Hawai'i, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Clare E. Connors is the chief legal officer of the State of Hawai'i and is authorized to appear, personally or by deputy, on behalf of the state in all courts and in all cases in which the state is a party. Haw. Const. art. V, § 6; Haw. Rev. Stat. Chapter 28; Haw. Rev. Stat. § 26-7.

17. Plaintiff the State of Illinois, represented by and through its Attorney General, Kwame Raoul, is a sovereign state of the United States of America. The Attorney General is Illinois's chief law enforcement officer and is authorized under 15 ILCS 205/4 to pursue this action.

18. Plaintiff the State of Maryland, by and through its Attorney General, Brian E. Frosh, is a sovereign state of the United States of America. The Attorney General is Maryland's chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General's powers and duties include acting on behalf of the State and the people of Maryland in the federal courts on matters of public concern. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); 2017 Md. Laws, Joint Resolution 1.

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19. Plaintiff the Commonwealth of Massachusetts, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is authorized to pursue this action under Mass. Gen. Laws ch. 12, §§ 3 and 10.

20. Plaintiff the State of Michigan, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Michigan's chief law enforcement officer and is authorized under Michigan law, Mich. Comp. Laws §§ 14.28 and 14.29, to pursue this action.

21. Plaintiff the State of Minnesota, represented by and through its Attorney General, is a sovereign state of the United States of America. The Attorney General is Minnesota's chief legal officer and is authorized to pursue this action on behalf of the State. Minn. Stat. § 8.01.

22. Plaintiff the State of Nevada, represented by and through its Attorney General, is a sovereign state of the United States of America. Attorney General Aaron D. Ford is the chief legal officer of the State of Nevada and has the authority to commence actions in federal court to protect the interests of Nevada. Nev. Rev. Stat. § 228.170. Governor Stephen F. Sisolak is the chief executive officer of the State of Nevada. The Governor is responsible for overseeing the operations of the State and ensuring that its laws are faithfully executed. Nev. Const., art. 5, § 1.

23. Plaintiff the State of New Jersey, represented by and through its Attorney General Gurbir S. Grewal, is a sovereign state of the United States of America. The Attorney General is New Jersey's chief legal officer and is authorized to pursue this action on behalf of the State. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

24. Plaintiff the State of New Mexico, represented by and through its Attorney General Hector Balderas, is a sovereign state of the United States of America. The Attorney

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General is authorized to bring an action on behalf of New Mexico in any court when, in his judgment, the interests of the State so require, N.M. Stat. Ann. § 8-5-2.

25. Plaintiff the State of North Carolina, represented by and through Attorney General Joshua H. Stein, is a sovereign state of the United States of America. The Attorney General is the State of North Carolina's chief law enforcement officer and brings this challenge pursuant to his independent constitutional, statutory, and common-law authority.

26. Plaintiff the State of Oregon, acting by and through the Attorney General of Oregon, Ellen F. Rosenblum, is a sovereign state of the United States of America. The Attorney General is the chief law officer of Oregon and is empowered to bring this action on behalf of the State of Oregon, the Governor, and the affected state agencies under Or. Rev. Stat. §§ 180.060, 180.210, and 180.220.

27. Plaintiff the Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority under 71 Pa. Stat. § 732-204.

28. Plaintiff the State of Rhode Island, represented by and through its Attorney General, is a sovereign state of the United States. Attorney General Peter F. Neronha is the chief legal advisor to the State of Rhode Island and is authorized to pursue this action pursuant to his constitutional, statutory, and common law authority. R.I. Const. art. IX § 12, R.I. Gen. Laws §§ 42-9-1 *et seq.*

29. Plaintiff the State of Vermont, represented by and through its Attorney General, Thomas J. Donovan, is a sovereign state in the United States of America. The Attorney General

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is the state's chief law enforcement officer and is authorized to pursue this action pursuant to Vt. Stat. Ann. tit. 3, §§ 152 and 157.

30. Plaintiff the Commonwealth of Virginia brings this action by and through its Attorney General, Mark R. Herring. The Attorney General has the authority to represent the Commonwealth, its departments, and its agencies in "all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A).

31. Plaintiff the State of Washington, represented by and through its Attorney General, Robert W. Ferguson, is a sovereign state of the United States of America. The Attorney General is the chief legal adviser to the State of Washington and is authorized to pursue this action pursuant to RCW 43.10.030. The Attorney General's powers and duties include acting in federal court on matters of public concern.

32. Plaintiff the City of Central Falls is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

33. Plaintiff the City of Chicago is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Illinois.

34. Plaintiff the City of Columbus is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Ohio and the City's Home Rule Charter.

35. Plaintiff the City of New York is a municipal corporation organized pursuant to the laws of the State of New York. New York City is a political subdivision of the State and derives its powers through the New York State Constitution, New York State laws, and the New York City Charter. New York City is the largest city in the United States by population.

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36. Plaintiff the City of Philadelphia is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

37. Plaintiff the City of Phoenix is a municipal corporation organized pursuant to the laws of the State of Arizona.

38. Plaintiff the City of Pittsburgh is a municipal corporation organized pursuant to the laws of the Commonwealth of Pennsylvania. The City is a political subdivision of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the City's Home Rule Charter.

39. Plaintiff the City of Providence is a municipal corporation organized pursuant to the laws of the State of Rhode Island.

40. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

41. Plaintiff the City of Seattle is a first-class charter city, incorporated under the laws of the State of Washington, empowered to sue and be sued, and represented by and through its elected City Attorney, Peter S. Holmes.

42. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas.

43. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas.

44. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas.

45. Plaintiff Monterey County, California is a political subdivision of the State of California.

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46. Plaintiffs are aggrieved by Defendants' decision and conduct and have standing to bring this action because Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests and will continue to cause injury unless and until the challenged decision and conduct are enjoined.

47. Defendant Donald J. Trump is the President of the United States. He is responsible for the actions and decisions that are being challenged by Plaintiffs in this action and is sued in his official capacity.

48. Defendant the United States Department of Commerce is a cabinet agency within the executive branch of the United States government. The Commerce Department is responsible for planning, designing, and implementing the 2020 Census. 13 U.S.C. § 4.

49. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is responsible for overseeing the Census Bureau, conducting the decennial census of the population, and reporting to the President the tabulation of total population by States for the apportionment of Representatives in Congress. 13 U.S.C. § 141. He is sued in his official capacity.

50. Defendant Bureau of the Census is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is responsible for planning and administering the decennial census.

51. Defendant Steven Dillingham is Director of the Census Bureau. He is sued in his official capacity.

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ALLEGATIONS

I. Constitutional and statutory background.

A. The Constitution requires apportioning Members of the House of Representatives among the States based on the total number of persons living in each State.

52. The Constitution requires that the Members of the House of 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; *see id.* art. I, § 2, cl. 3.

53. The number of Representatives apportioned to each State, along with the two Senators given to each State, determines the allocation among the States of electors in the Electoral College. *Id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3.

54. To apportion Representatives among the States properly (and ultimately to allocate electors among the States properly) the Constitution requires an "actual Enumeration" of the total population every ten years, *id.* art. I, § 2, cl. 3.

55. "By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without," and to use that enumeration of the total population "to apportion Representatives among the states." *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019).

56. More than two hundred years of history, practice, and judicial and administrative precedents establish that the apportionment of Representatives must be based on *all persons living* in each State, regardless of their citizenship or immigration status.

57. During the country's founding, the Framers debated the proper basis on which to apportion Representatives and declared that Representatives "shall be apportioned among the

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several States which may be included within this Union, according to their *respective Numbers*." U.S. Const. art. I, § 2, cl. 3 (emphasis added). The Framers repeatedly made clear that the basis for apportionment of Representatives was thus all persons. For example, as James Madison explained in 1788, the "fundamental principle of the proposed constitution" ensured that "the aggregate number of representatives allotted to the several states, is to be . . . founded on the aggregate number of inhabitants." The Federalist No. 54, p. 284 (G. Carey & J. McClellan eds. 2001).

58. The original Apportionment Clause provided for only two exceptions to the use of total population for apportionment. First, "Indians not taxed" were excluded from the apportionment base. U.S. Const. art. I, § 2, cl. 1, § 3. Second, slaves were counted as only three-fifth of a person. *Id.* No other exceptions were provided, making clear that all other persons living in the United States needed to be counted by the decennial enumeration and included in the apportionment base.

59. When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats among the States and reaffirmed that apportionment must be based on *all persons living* in each State—citizens and noncitizens alike. The Framers of the Fourteenth Amendment rejected numerous proposals to change the basis of apportionment from total population to voter population. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposal to apportion representatives among the States "according to their respective legal voters").

60. Instead, the Framers amended the Constitution to remove the provision that counted slaves as three-fifths of a person and declared that apportionment of Representatives must be based on the "whole number of persons in each State." U.S. Const. amend. XIV, § 2.

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As the Fourteenth Amendment's Framers explained, "numbers," *i.e.*, all persons living in each State, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (Jacob Howard).

61. Basing apportionment on all persons, the Framers further emphasized, ensured that each State's representation in the House reflected all persons regardless of whether they could then vote, including women, children, and the "entire immigrant population not naturalized." *Id.* at 432 (Rep. John Bingham); *see, e.g.*, *id.* at 411 (representation based on number of voters improperly "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)).

62. Since 1790, in accordance with the Constitution's express requirement to base apportionment on all persons living in each State, the decennial actual enumeration has *always* counted all persons living in the United States based on where they "usually reside[]." *See* Census Act of 1790, § 5, 1 Stat. 101 (1790); *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg, 28,950, 28,950 (May 20, 2015) ("The Census Act of 1790 established the concept of 'usual residence' as the main principle in determining where people are to be counted. This concept has been followed in all subsequent censuses.").

63. Under the Census Bureau's well-settled practice and a final rule that it promulgated pursuant to notice-and-comment rulemaking for the 2020 Census, usual residence means the place where a person lives and sleeps most of the time. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

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64. Accordingly, the decennial enumeration and apportionment base includes all noncitizens who live and sleep most of the time in the United States, regardless of their place of citizenship or immigration status. *See, e.g.*, *id.* The enumeration likewise counts noncitizens who are "members of the diplomatic community" "at the embassy, consulate, United Nations' facility, or other residences where diplomats live." *Id.*

65. By contrast, noncitizens who are temporarily visiting the United States, such as on a vacation or business trip, are not included in the decennial enumeration and apportionment base because they do not live and sleep most of the time in the United States. *See, e.g.*, *id.*

66. The millions of undocumented immigrants who do live in the United States have an established presence here. These immigrants have moved to the United States, and they are members of their state and local communities.

67. For example, the Migration Policy Institute has estimated, based on data from 2012 to 2016, that more than nine million undocumented immigrants have lived in the United States for five years or more. The Migration Policy Institute estimated that more than seven million undocumented immigrants have lived in this country for ten years or more, and that nearly four million undocumented immigrants have lived here for twenty years or more.[1]

68. Undocumented immigrants residing here both contribute to and participate in their communities and in many public programs. For example, millions of undocumented immigrants

[1] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

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work here and pay taxes.[2] Many undocumented immigrants live here with their family members, including children who are United States citizens.[3]

69. Based on the Constitution's text, more than two centuries of history, and well-settled census practice, the Supreme Court and other courts have repeatedly made clear that the Fourteenth Amendment requires apportionment of Representatives based on the total number of all persons living in each State. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 10-18 (1964); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). Courts have also repeatedly determined that the "whole number of persons" used to apportion Representatives includes all noncitizens who are living in the United States regardless of their immigration status. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576-78 (D.D.C. 1980) (three-judge court).

70. The federal government, and several of the Defendants here, have conceded that the decennial enumeration that constitutes the apportionment base must count all persons living in the United States.

71. For example, on March 14, 2019, Secretary Ross testified under oath during a congressional committee hearing, stating "The constitutional mandate, sir, for the census is to try

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[2] *See, e.g.*, Jens Manuel Krogstad et al., Pew Research Center, *5 facts about illegal immigration in the U.S.* (June 12, 2019), https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s (estimating that in 2017, the United States' civilian workforce included 7.6 million undocumented immigrants); American Immigration Council, *Adding Up the Billions in Tax Dollars Paid by Undocumented Immigrants* 1, https://www.americanimmigrationcouncil.org/sites/default/files/research/adding_up_the_billions_in_tax_dollars_paid_by_undocumented_immigrants.pdf; Hunter Hallman, Bipartisan Policy Center, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer* (Mar. 28, 2018), https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/.

[3] Migration Policy Institute, *supra* (estimating that more than 3 million undocumented immigrants over the age of 15 resided with a citizen child under the age of 18).

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to count *every person residing* in the U.S. at their place of residence on the dates when the census is conducted." *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019) (emphasis added). Secretary Ross further testified that "the Department of Commerce is fully committed to administering as complete and accurate decennial census as we can. We intend to try to *count every person* taking all necessary actions to do so." *Id.* (emphasis added).

72. During a congressional committee hearing in February 2020, Census Bureau Director Dillingham stated that the Bureau will "*count everyone*, wherever they are living," including undocumented immigrants. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (Feb. 12, 2020) (emphasis added).

73. The federal government has repeatedly argued that excluding undocumented immigrants from the decennial enumeration or the apportionment base violates the Constitution and applicable statutes. For example, in *Federation for American Immigration Reform v. Klutznick*, the government urged a district court to reject claims demanding exclusion of undocumented immigrants from the "whole number of persons" that constitutes the apportionment base. The government explained that "the plain language of the Constitution, as well as the intent of its framers, establishes that *all* inhabitants, including illegal aliens, must be enumerated for the purpose of apportioning Representatives."[4]

74. Similarly, the Department of Justice's Office of Legislative Affairs has opined that the Constitution requires inclusion of undocumented immigrants in the decennial

[4] Defs.' Mem. of Points & Authorities in Support of Mot. to Dismiss or for Summary Judgment, No. 79-3269 (D.D.C.), *reprinted in 1980 Census: Counting Illegal Aliens, Hr'gs Before the S. Subcomm. on Energy, Nuclear Proliferation and Federal Services*, 96th Cong. 125-156 (1980).

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enumeration that constitutes the apportionment base. *See, e.g.*, Letter from Carol T. Crawford, Assistant Attorney General, to Senator Jeff Bingham (Sept. 22, 1989).

75. The population count derived from the census is used not only to apportion representatives and ultimately electors "but also to allocate federal funds to the States and to draw electoral districts." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

76. For these reasons, the "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997).

B. The Census Act requires that the total population count used for congressional apportionment include all persons living in the United States.

77. The Constitution provides that an "actual Enumeration shall be made" every ten years "in such manner as [Congress] shall direct by law." U.S. Const. art. I, § 2. Congress has exercised its authority over the census by enacting various statutory provisions ("Census Act").

78. Congress has assigned the responsibility of conducting the decennial enumeration to the Secretary of Commerce, and the Secretary may delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141.

79. The Census Act requires that the decennial census be taken on April 1, 2020, the "decennial census date." 13 U.S.C. § 141(a). The Secretary of Commerce has no discretion to delay the decennial census date under the Census Act. *Id.*

80. Within nine months of the decennial census date, *i.e.*, by January 1, 2021, the Secretary of Commerce must report to the President "[t]he tabulation of total population by States" that is "required for the apportionment of Representatives in Congress among the several States." *Id.* § 141(b).

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81. Then, between January 3 and January 8, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and 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, no State to receive less than one Member." 2 U.S.C. § 2a(a).

82. Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives must transmit "to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

II. Defendants' unlawful attempt to add a citizenship question to the decennial census.

83. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are directly related to Secretary Ross's earlier and unlawful attempt to alter the decennial census that provides the apportionment count by adding a question inquiring about citizenship status.

84. On March 26, 2018, Secretary Ross directed the Census Bureau to use the 2020 Census to demand information on the citizenship status of every resident in the country.[5] Secretary Ross stated that he had decided to add the citizenship question because doing so was "necessary to provide complete and accurate data" that would aid enforcement of the Voting Rights Act (VRA) by the Department of Justice.

[5] Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 7 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files" /2018-03-26_2.pdf.

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85. Many of the plaintiffs here filed a lawsuit challenging the addition of the citizenship question as, among other things, arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). *See* Second Am. Compl., *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 210 (S.D.N.Y. filed July 23, 2018).

86. After an eight-day bench trial, the United States District Court for the Southern District of New York vacated Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire. *New York*, 351 F. Supp. 3d at 679. In so ruling, the court concluded that the plaintiffs had standing to sue because the inclusion of a citizenship question would deter participation in the census by households with a noncitizen and lead to a differential undercount of noncitizens and Hispanics that would concretely harm plaintiffs in various ways. *Id.* at 578-593. For example, the court found that adding a citizenship question would cause some plaintiffs to lose congressional seats, impair state and local redistricting efforts that rely on census numbers, harm the quality and accuracy of census data, and reduce federal funding to plaintiffs' jurisdictions. *Id.* at 593-98, 607-15.

87. The court also determined that Secretary Ross's decision violated the Administrative Procedure Act for several reasons, including because his rationale for adding the citizenship question was pretextual. *Id.* at 660-64. As the court explained, the evidence was "clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision [to add the citizenship question] was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." *Id.* at 660. The court noted that it was "unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were." *Id.* at 569-70.

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88. The Supreme Court granted certiorari before judgment and affirmed, in relevant part, the district court's final judgment setting aside the Secretary's decision to add a citizenship question. The Supreme Court held that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Dep't of Commerce*, 139 S. Ct. at 2573. The Court reasoned that the Secretary's decision "cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA" because there was "a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 2575. In short, Secretary Ross's "VRA enforcement rationale—the sole stated reason—seems to have been contrived." *Id.*

89. After the Supreme Court remanded the case to the district court, the court entered a permanent injunction that enjoined the defendants "from including a citizenship question on the 2020 decennial census questionnaire; from delaying the process of printing the 2020 decennial census questionnaire after June 30, 2019 for the purpose of including a citizenship question; and from asking persons about citizenship status on the 2020 census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census." Order, *New York v. Dep't of Commerce*, No. 18-cv-2921, Doc. No. 634 (S.D.N.Y. July 16, 2019).

90. On July 11, 2019, President Trump issued an Executive Order to "ensure that accurate citizenship data is compiled in connection with the census" notwithstanding the Supreme Court's decision and the district court's order precluding the use of a citizenship question in the 2020 Census. *Collecting Information About Citizenship Status in Connection with the Decennial Census*, Exec. Order 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019).

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91. To achieve that goal, President Trump directed all executive departments and agencies to provide to the Department of Commerce "the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country." *Id.*

92. In a public statement accompanying the issuance of the Executive Order, given from the White House's Rose Garden, President Trump made clear that the federal government would not be "backing down on our effort to determine the citizenship status of the United States population." President Donald Trump, *Remarks by President Trump on Citizenship and the Census* (July 19, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/. President Trump stated that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States.' Now they're trying to erase the very existence of a very important word and a very important thing: citizenship." *Id.*

93. President Trump further stated that, pursuant to the Executive Order, the federal government will be taking steps "to ensure that citizenship is counted so that we know how many citizens we have in the United States." *Id.*

III. The July 21, 2020 Memorandum directing exclusion of undocumented immigrants from the apportionment count.

94. Recent events have now laid bare the real reasons driving Secretary Ross's decision to add a citizenship question to the 2020 Census: to exclude undocumented persons from the "whole number of persons" that constitutes the apportionment base and to discriminate against Hispanics and noncitizens.

95. On July 21, 2020, President Trump issued a memorandum (i) declaring that undocumented immigrants will be excluded from the "whole number of persons in each State" enumerated by the 2020 Census and used to apportion the number of Representatives to each State, and (ii) directing the Secretary to take "all appropriate action" to provide the President

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with information to exclude undocumented immigrants from the apportionment base. *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020) (attached as Ex. 1).

96. The Memorandum declares that "[f]or the purpose of the reapportionment of Representatives following the 2020 Census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), to the maximum extent feasible." *Id.* at 44,680.

97. The Memorandum asserts that the Executive branch has purported "discretion" to exclude from the apportionment base all undocumented immigrants who reside in the United States, *id.* at 44,679—no matter how long they have been living here.

98. The Memorandum acknowledges that the Constitution explicitly requires apportionment of Representatives based on the "whole number of persons in each State." *Id.* It states that not every person who is physically present on the decennial census date is living in the United States. *Id.* For example, the Memorandum states, noncitizens who are temporarily visiting on vacation or for business are not "inhabitants" of the United States and are thus not included in the apportionment base. *Id.* Without any plausible basis, the Memorandum then asserts that purported "discretion delegated to the executive branch to determine who qualifies as an 'inhabitant' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status"—even if those persons have been living in the United States for many years. *Id.*

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99. In the Memorandum, President Trump targets States (including some of the plaintiff States) that have many undocumented immigrants living in their jurisdictions or that have declined to affirmatively assist the federal government's immigration enforcement efforts.

100. For example, President Trump stated that "[a]ffording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles." *Id.* at 44,680. The Memorandum further stated that States that decline to adopt state laws or policies to assist federal efforts to enforce the immigration laws passed by Congress should essentially be stripped of any "representation in the House of Representatives" that is based on undocumented immigrants living in their jurisdictions. *Id.*

101. The Memorandum requires Secretary Ross, in preparing his § 141(b) report of the actual enumeration on which apportionment must be based, to take actions "to provide information" to the President to exclude undocumented immigrants from apportionment. *Id.* The Memorandum thus directs the Secretary (and by extension the Commerce Department and Census Bureau) to take actions to enable the President to exclude undocumented immigrants from his § 2a(a) report of both the "whole number of persons in each State" and the corresponding number of Representatives that each State receives. *Id.*

102. On the same day that he issued the Memorandum, President Trump issued a public statement making clear that Defendants' decision and actions to exclude undocumented immigrants from the apportionment base are a continuation of the federal government's prior unlawful attempt to add a citizenship question to the 2020 Census. President Donald Trump,

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Statement from the President Regarding Apportionment (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

103. As President Trump's statement explained, he had previously asserted during his Rose Garden statements in July 2019 that he "would not back down in [his] effort to determine the citizenship status of the United States population." *Id.* He further explained that he was now following "through on that commitment by directing the Secretary of Commerce to exclude illegal aliens from the apportionment base following the 2020 census." *Id.* Echoing his earlier statements about the citizenship question, Trump further asserted that "[t]here used to be a time when you could proudly declare, 'I am a citizen of the United States'" and that "the radical left is trying to erase the existence of this concept and conceal the number of illegal aliens in our country." *Id.* He stated that his Memorandum directing exclusion of undocumented immigrants from the apportionment base responds to a purported "broader left-wing effort to erode the rights of Americans citizens." *Id.*

104. Upon information and belief, following receipt of the Memorandum, the Secretary or Department of Commerce has issued (or will imminently issue) directives to the Census Bureau, constituting final agency action, to implement President Trump's directive to exclude noncitizens from the enumeration and apportionment base.

IV. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color.

105. The Memorandum explicitly states that its goal is to reduce political influence and congressional representation to jurisdictions with a larger share of undocumented immigrants. 85 Fed. Reg. at 44,680.

106. President Trump has repeatedly articulated concerns about the growth of immigrant communities and the impact of that growth on political power, and has sought to

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minimize the power of Hispanic and immigrant communities to increase the power of non-Hispanic whites.

107. During the 2016 presidential campaign, for example, President Trump tweeted: "How crazy—7.5% of all births in U.S. are to illegal immigrants, over 300,000 babies per year. This must stop."[6]

108. On April 5, 2018, when discussing his opposition to family-based immigration systems, President Trump claimed that Democrats favor "chain migration" because the party believes the immigrants will "vote Democratic." Three weeks later, on April 28, President Trump revisited this topic, stating that Democrats favor undocumented immigration because "all of these people that are pouring across are going to vote for Democrats, they're not going to vote for Republicans."[7]

109. Defendants' exclusion of undocumented immigrants from the apportionment base is of a piece with President Trump's anti-immigrant and anti-Hispanic rhetoric and his Administration's targeting of immigrant and Hispanic communities, which reflect animus towards those groups.

110. President Trump has long engaged in rhetoric that disparages Hispanics and immigrants of color. In statements stretching back to the beginning of his campaign, President Trump has repeatedly dehumanized, devalued, and vilified immigrants in general, and specifically immigrants from Latin America. For instance:

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[6] Donald Trump (@realDonaldTrump), Twitter (Aug. 21, 2015 6:56 AM), https://twitter.com/realdonaldtrump/status/634725641972248576.

[7] Fox News (@FoxNews), Twitter (Apr. 28, 2018), https://twitter.com/foxnews/status/990383288232620032.

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a. During his campaign launch in June 2015, President Trump claimed that "[w]hen Mexico sends its people. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from more than Mexico. It's coming from all over South and Latin America."[8]

b. During a meeting about recent immigrants in the Oval Office in June 2017, President Trump stated that 15,000 immigrants from Haiti "all have AIDS" and that 40,000 immigrants from Nigeria would never "go back to their huts" in Africa after seeing the United States.[9]

c. During a January 2018 meeting with lawmakers, while discussing protections for immigrants from Haiti, El Salvador and other African countries, President Trump asked why the United States is "having all these people from shithole countries come here" and suggested that the United States should have more immigrants from countries like Norway.[10]

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[8] *Full text: Donald Trump announces a presidential bid*, Wash. Post, June 16, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/.

[9] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times, Dec. 23, 2017, https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html.

[10] Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as 'shithole' countries*, Jan. 12, 2018, https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946.

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d. In a May 16, 2018 speech, President Trump stated that "[w]e have people coming into the country, or trying to come in . . . . You wouldn't believe how bad these people are. These aren't people, these are animals."[11]

e. Speaking on the topic of migrant groups travelling to the United States from Central America at a rally on May 8, 2019, President Trump, stated, "[W]hen you see these caravans starting out with 20,000 people, that's an invasion."[12]

111. President Trump has acted on this rhetoric by adopting policies that seek to isolate, exclude, and instill fear in Hispanic immigrants and other immigrants of color. For instance, the Trump Administration has:

a. Attempted to rescind the Deferred Action for Childhood Arrivals program, which protected 800,000 individuals, 90% of whom were Hispanic and 80% of whom were Mexican-American;

b. Banned travel from several majority-Muslim countries;

c. Suspended refugee admissions to the United States;

d. Terminated special protections from removal for migrants from nations experiencing war and natural disasters, including Nicaragua, Honduras, Haiti and El Salvador;

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[11] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times, May 16, 2018, https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

[12] *President Trump Holds Rally in Panama City Beach, Florida*, C-SPAN (May 8, 2019) (video), https://www.c-span.org/video/?460412-1/president-trump-holds-rally-panama-city-beach-florida.

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e. Increased actual and threatened raids and deportations of undocumented migrants, including, as recently as June 17, 2019, when President Trump tweeted a threat that "[n]ext week ICE will begin the process of removing the millions of illegal aliens who have illicitly found their way into the United States. They will be removed as fast as they come in";[13]

f. Attempted to build a physical wall along the Mexico-U.S. border;

g. Adopted policies of separating children from their families when entering the United States from Mexico, and detaining children separate from their parents and families thereafter; and

h. Maintained children and other migrants across the U.S.-Mexico border in detention facilities that the United Nations Children's Fund has described as "dire" and as causing "irreparable harm" to children housed in them.[14]

112. These public statements and actions from Defendant Trump establish that the rationale for excluding undocumented immigrants from the apportionment base is motivated by racial animus against immigrants of color, and a desire to curb the political power of immigrant communities of color.

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[13] Nick Miroff & Maria Sacchetti, *Trump vows mass immigration arrests, removals of 'millions of illegal aliens' starting next week*, Wash. Post, June 17, 2019, https://www.washingtonpost.com/immigration/trump-vows-mass-immigration-arrests-removals-of-millions-of-illegal-aliens-starting-next-week/2019/06/17/4e366f5e-916d-11e9-aadb-74e6b2b46f6a_story.html?utm_term=.ece5e6a6b7e6.

[14] *After Rio Grande tragedy, UNICEF chief highlights "dire" detention centres on US-Mexico border*, UN News (June 27, 2019), https://news.un.org/en/story/2019/06/1041421.

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V. Plaintiffs are harmed by Defendants' decision to exclude undocumented immigrants from the apportionment base.

113. Defendants' decision and actions to exclude undocumented immigrants from the apportionment base harm Plaintiffs' sovereign, quasi-sovereign, economic, and proprietary interests because they will cause some Plaintiffs to lose congressional seats and decrease their share of presidential electors in the Electoral College; skew the division of electoral districts within Plaintiffs' jurisdictions by impairing state and local redistricting efforts that rely on the census count; reduce federal funds to Plaintiffs' jurisdictions by deterring immigrants from responding to the decennial census that is currently underway; and degrade the quality of census data that Plaintiffs rely on to perform critical governmental functions.

114. First, excluding undocumented immigrants from the apportionment count will likely cause several States to lose one or more Representatives in Congress, directly harming those Plaintiff States, as well as those Plaintiff counties and cities within affected States, by diluting their political power and undermining their interest in fair congressional representation.

115. For example, large numbers of undocumented immigrants reside in California, Texas, New York, New Jersey, and Illinois.[15] Defendants' decision to exclude undocumented immigrants from the apportionment count is likely to directly reduce representation for those jurisdictions in Congress, injuring the representational interests of Plaintiffs the State of New York, State of New Jersey, State of Illinois, City of Chicago, City of New York, City and County of San Francisco, Cameron County, El Paso County, Hidalgo County, and Monterey County.

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[15] Pew Research Center, November 27, 2018, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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Other Plaintiffs may also suffer direct representational harms if undocumented individuals are excluded from the apportionment count.

116. The Memorandum itself acknowledges and intends these harms. *See* 85 Fed. Reg. at 44,680 (recognizing that excluding undocumented immigrants will "result in the allocation" of fewer congressional seats "than would otherwise be allocated" to some states).

117. The loss of a congressional seat will also cause the affected Plaintiff States, counties, and cities to lose one or more votes in the Electoral College, impairing their ability to elect the President and Vice President and harming their political power.

118. Second, excluding undocumented immigrants from the apportionment base will harm Plaintiffs' representational interests by directly impairing Plaintiffs' ability to draw accurate districting lines for congressional, state, or local legislative districts.

119. To comply with the Fourteenth Amendment's one-person, one-vote requirement, States must use total population as the population base for congressional redistricting. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (describing "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"); *see Evenwel*, 136 S. Ct. at 1129. Defendants' decision to exclude undocumented immigrants from the apportionment base will undermine Plaintiff States' ability to comply with this Constitutional mandate.

120. Certain Plaintiffs are required by state constitutional or statutory provisions to use the total population count from the decennial census as the basis for redistricting within their jurisdictions. New York state law provides, for example, that "each federal census taken decennially . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of

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senate and assembly districts." N.Y. Const. art. III, § 4(a); *see also id.* §§ 3-5, 5-a. Many of the other Plaintiffs have comparable laws.[16]

121. Third, excluding undocumented immigrants from the apportionment base will deprive Plaintiffs of critical federal funding and inflict substantial financial harms on Plaintiffs.

122. Political science literature establishes that States that lose seats in Congress typically see a decrease in their share of federal outlays in subsequent years due to the reduction in their voting power in Congress. *See, e.g.*, Roy Elis, Neil Malhotra, & Marc Meredith, *Apportionment Cycles as Natural Experiments*, Political Analysis 358-76 (2009). Those Plaintiffs likely to lose representation in Congress therefore also stand to lose critical federal resources as a result.

123. All Plaintiffs will further suffer financial harm because Defendants' decision to exclude undocumented immigrants from the apportionment base will deter participation in the ongoing decennial census, undermining the Census Bureau's efforts to count immigrants and their families, and depriving Plaintiffs of their fair share of census-derived federal funds.

124. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants.[17] Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. These

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[16] *See, e.g.*, Chicago Municipal code § 2-8-300; D.C. Code § 1-1011.01; Mass. Const. Amend. art. CI, §§ 1, 2, arts. CIX, CXVII, CXIX; Nev. Const. art. IV, § 5, art. XV, § 13; Tex. Const. art. 3, § 26; Va. Code Ann. § 30-265; Vt. Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902; Wash. Const. art. II, § 43; Wash. Rev. Code §§ 29A.76.010, 44.05.090.

[17] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Center (Nov. 27, 2018), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2019/03/Pew-Research-Center_2018-11-27_U-S-Unauthorized-Immigrants-Total-Dips_Updated-2019-06-25.pdf.

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households are already less likely to respond to the census questionnaire; this Administration's ongoing efforts to target immigrants—including Defendants' failed efforts to add a citizenship question to the decennial census—have engendered substantial fear within these communities.[18]

125. The COVID-19 pandemic has further hampered efforts to ensure that all people—including hard-to-count populations—are counted. For example, the census relies upon non-response follow up operations (NRFU) to contact potential respondents and increase the census response rate. But NRFU operations were suspended and delayed during the pandemic, and the Government Accountability Office has raised concerns that even when resumed, these efforts will be less effective in light of the virus.[19]

126. Defendants' decision to exclude undocumented immigrants from the apportionment base was announced just weeks before Census Bureau enumerators were finally scheduled to go into the field to encourage households to respond to the census,[20] creating confusion and further increasing the risk of an undercount.

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[18] *See, e.g.*, Alexandra Schmidt, *Citizenship question is gone. Michigan immigrants still distrust the Census*, (Mar. 2, 2020), https://www.bridgemi.com/michigan-government/citizenship-question-gone-michigan-immigrants-still-distrust-census (noting ongoing "fear among immigrants about what the government will do with information collected in the count").

[19] *See* U.S. Government Accountability Office, *2020 Census: COVID-19 Presents Delays and Risks to Census Count* https://www.gao.gov/products/GAO-20-551R#summary.

[20] U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19*, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited July 24, 2020).

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127. The announcement of Defendants' decision was intended to promote fear and deter participation in the census by immigrants and their families, including through the President's remarks that he "will not stand" for efforts to "conceal the number" of immigrants.[21]

128. The Census Bureau has repeatedly emphasized that "[e]veryone counts," citizens and noncitizens alike.[22] But Defendants' decision and actions to exclude undocumented immigrants from the apportionment base do the opposite. Excluding undocumented immigrants from the apportionment count communicates to immigrants that their census responses are less valuable and less important than those of citizens.

129. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. At least 320 federal domestic financial assistance programs rely on census data to allocate money; in fiscal year 2016, these programs "allocated about $900 billion using census-derived data." *New York*, 351 F. Supp. 3d at 596. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. The reduction in census participation caused by Defendants' announcement that they will exclude undocumented immigrants from the apportionment base will harm Plaintiffs by depriving them of their statutory fair share of federal funding and removing crucial resources for important government services.

130. Finally, by deterring immigrants and their families from responding to the decennial census, Defendants' decision to exclude undocumented immigrations from the apportionment base will degrade the quality of census data. As census self-response rates

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[21] President Donald Trump, *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/.

[22] *See, e.g.*, Census Bureau, *Setting the Record Straight*, https://2020census.gov/en/news-events/rumors.html.

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decline, the quality of the data—including information relating to population subgroups and their characteristics—worsens. But Plaintiffs "rely on accurate data to perform essential governmental functions," including to draw school zones, deploy health care resources, and make infrastructure decisions. *Id.* at 600. Defendants' decision will therefore undermine Plaintiffs' interests in using accurate census data to perform critical governmental functions.

VI. Defendants have not identified any reliable method to accurately enumerate the population of undocumented immigrants.

131. Defendants cannot reliably exclude undocumented immigrants from the apportionment count. Just months ago, the Federal Government represented in separate litigation that there is a "lack of accurate estimates of the resident undocumented population" on a state-by-state basis.[23]

132. Although a previous executive order suggests that the Census Bureau may rely on administrative records to identify *noncitizens*, *see* 84 Fed. Reg. at 33,821, many noncitizens are lawfully present; and administrative records cannot provide sufficiently reliable or accurate information about whether noncitizens are *undocumented*, particularly for actual enumeration and apportionment purposes. Indeed, administrative records are "weak in their coverage of undocumented aliens because programs typically require documentation that many undocumented aliens do not have."[24] The limited administrative records available with respect to undocumented immigrants are incomplete, outdated, and often inaccurate.

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[23] Decl. of Census Bureau Senior Advisor Enrique Lamas, Defs.' Supp. Rule 26(a)(1) Disclosures and Rule 26(a)(2)(C) Disclosures, *Alabama v. Dep't of Commerce*, No. 2:18-cv-00772-RDP (N.D. Ala. Mar. 13, 2020).

[24] John L. Czajka, *Can Administrative Records Be Used to Reduce Nonresponse Bias?*, 645 Annals Am. Acad. Pol. & Social Sci. 171, 175 (2013).

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133. For example, the Department of Homeland Security (DHS) recently acknowledged that determining immigration status from their records is "challenging," given the "the decentralized nature of admission and immigration information, as well as the lack of a nationwide departure control system."[25] DHS has acknowledged that time lags between collecting and reporting data mean that "data accuracy issues may arise."[26] Even when used in combination, existing administrative records are inadequate to ascertain reliably whether individuals are undocumented.

134. Although the federal government has already suggested that they may resort to "statistical modeling" to estimate the undocumented population in furtherance of the Presidential Memorandum, the Census Bureau has not yet "formulated a methodology,"[27] and Defendants have not articulated how such statistical modeling will comport with their constitutional obligation to conduct an "actual Enumeration." U.S. Const. art. 1, § 2, cl. 3.

135. Despite Defendants' failure to identify any reliable method to accurately enumerate the population of undocumented immigrants, Defendants have already decided to report that population to the President and to exclude that population from the tabulation of total population reported to Congress. Defendants' commitment to proceeding on this course of action without regard to the unreliability or inaccuracy of their underlying enumeration demonstrates that they have prejudged the decision, violates their statutory obligations to report

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[25] Department of Homeland Security, *Privacy Impact Assessment for the Department of Homeland Security Immigration-Related Information Sharing with the U.S. Census Bureau*, 2, 11 (Dec. 20, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs079-sharingwithcensus-december2019.pdf.

[26] *Id.* at 6.

[27] Hansi Lo Wang (@hansilowang), Twitter (July 22, 2020, 10:58 AM), https://twitter.com/hansilowang/status/1285952274410409985.

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total population, and confirms the irrational and arbitrary nature of their decision and actions to exclude undocumented immigrants from the actual enumeration and apportionment base.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(U.S. Constitution article I, section 2, clause 3; U.S. Constitution amend. XIV, sec. 2)

136. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

137. The Constitution requires that "Representatives shall 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; *see id.* art. I, § 2, cl. 3.

138. Undocumented immigrants are persons. *Plyler*, 457 U.S. at 210 ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

139. Defendants' decision to exclude undocumented immigrants from the apportionment base for the purpose of reapportionment of Representatives following the 2020 Census, as well as any action they take to implement or further that decision, violates the constitutional command to apportion Representatives "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

140. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF

(U.S. Constitution amend. V—Due Process Clause)

141. Plaintiff States incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

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142. Under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal government cannot deny to any person the equal protection of its laws. The Due Process Clause specifically prohibits the federal government from discriminating against individuals on the basis of race, ethnicity, and national origin. U.S. Const. amend. V.

143. Defendants' decision to exclude undocumented immigrants from the apportionment base is motivated by discriminatory animus toward Hispanics and immigrant communities of color. This animus is reflected in Defendants' repeated statements vilifying these communities.

144. The highly unusual chronology of events, sharp departure from centuries of past practice, articulation of a pretextual reason for Defendants' now-enjoined efforts to demand citizenship information on the decennial census questionnaire, and disproportionate burden of Defendants' decision on Hispanics and immigrant communities of color further indicate that Defendants' decision is motivated by unconstitutional discriminatory purpose.

145. By excluding undocumented immigrants from the apportionment base, Defendants intend to reduce political power, influence, and funding resources among Hispanic and immigrant communities as compared to non-Hispanic whites.

146. Defendants' violation causes ongoing harm to Plaintiff States and their residents.

THIRD CLAIM FOR RELIEF

(U.S. Constitution amend. X)

147. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

148. The Tenth Amendment prohibits the federal government from coercing states and localities to legislate or promote policies that capitulate to federal interests.

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149. Defendants' decision to exclude undocumented immigrants from the apportionment count punishes Plaintiffs for refusing to assist in the enforcement of federal immigration law, in an attempt to coerce Plaintiffs to change their policies. 85 Fed. Reg. at 44,680.

150. The Tenth Amendment requires the federal government to respect the equal sovereignty of the sovereign states.

151. Without adequate justification, Defendants' decision to exclude undocumented immigrants from the apportionment count impermissibly targets certain states for unfavorable treatment because of their refusal to assist in the enforcement of federal immigration law. 85 Fed. Reg. at 44,680.

152. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

FOURTH CLAIM FOR RELIEF

(Administrative Procedure Act, 5 U.S.C. § 706)

153. Plaintiffs incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

154. The Administrative Procedure Act provides that the Court "shall" "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

155. Defendants' decision to exclude undocumented immigrants from the apportionment base, as well as any action they take to implement or further that decision, is arbitrary and capricious because it is contrary to the evidence before the agency and fails to consider important aspects of the problem, including that Defendants lack data reliably to exclude undocumented immigrants from the apportionment base.

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156. Defendants' decision and any implementing actions they undertake are also not in accordance with law because the Census Act requires the Secretary to tabulate and report to the President a tabulation of "total population by States . . . as required for apportionment of Representatives in Congress." 13 U.S.C. § 141(b).

157. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census, as well as any action they take to implement or further that decision, is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to exclude undocumented immigrants from the apportionment base following the 2020 Census is intentionally discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment;

3. Declare that Defendants' decision and any implementing actions they take are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

4. Enjoin Defendants and all those acting on their behalf from excluding undocumented immigrants from the apportionment base following the 2020 Census, or taking any action to implement or further such a policy;

5. Issue an order holding unlawful, vacating, and setting aside the decision to exclude undocumented immigrants from the apportionment base, as well as any action taken to implement or further that decision;

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6. Issue a writ of mandamus compelling the Secretary of Commerce to tabulate and report to the President the total population by States under 13 U.S.C § 141(b) based solely on the total number of persons in each State, including undocumented immigrants, without providing any information about the number of undocumented immigrants in each State.

7. Issue a writ of mandamus compelling the President to transmit to Congress pursuant to 2 U.S.C. § 2a(a) a statement of the whole number of persons in each State, and 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, based on the total number of residents of each state, including undocumented immigrants.

8. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and

9. Grant such other and further relief as the Court deems just and proper.

DATED: July 24, 2020

Respectfully submitted,

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BC-DOC-0000002143

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* Application for *pro hac vice* admission forthcoming

BC-DOC-0000002151

Exhibit 1

Federal Register
Vol. 85, No. 142
Thursday, July 23, 2020

Presidential Documents

Title 3—

The President

Memorandum of July 21, 2020

Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census

Memorandum for the Secretary of Commerce

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* In order to apportion Representatives among the States, the Constitution requires the enumeration of the population of the United States every 10 years and grants the Congress the power and discretion to direct the manner in which this decennial census is conducted (U.S. Const. art. I, sec. 2, cl. 3). The Congress has charged the Secretary of Commerce (the Secretary) with directing the conduct of the decennial census in such form and content as the Secretary may determine (13 U.S.C. 141(a)). By the direction of the Congress, the Secretary then transmits to the President the report of his tabulation of total population for the apportionment of Representatives in the Congress (13 U.S.C. 141(b)). The President, by law, makes the final determination regarding the ''whole number of persons in each State,'' which determines the number of Representatives to be apportioned to each State, and transmits these determinations and accompanying census data to the Congress (2 U.S.C. 2a(a)). The Congress has provided that it is ''the President's personal transmittal of the report to Congress'' that ''settles the apportionment'' of Representatives among the States, and the President's discretion to settle the apportionment is more than ''ceremonial or ministerial'' and is essential ''to the integrity of the process'' (*Franklin* v. *Massachusetts,* 505 U.S. 788, 799, and 800 (1992)).

The Constitution does not specifically define which persons must be included in the apportionment base. Although the Constitution requires the ''persons in each State, excluding Indians not taxed,'' to be enumerated in the census, that requirement has never been understood to include in the apportionment base every individual physically present within a State's boundaries at the time of the census. Instead, the term ''persons in each State'' has been interpreted to mean that only the ''inhabitants'' of each State should be included. Determining which persons should be considered ''inhabitants'' for the purpose of apportionment requires the exercise of judgment. For example, aliens who are only temporarily in the United States, such as for business or tourism, and certain foreign diplomatic personnel are ''persons'' who have been excluded from the apportionment base in past censuses. Conversely, the Constitution also has never been understood to exclude every person who is not physically ''in'' a State at the time of the census. For example, overseas Federal personnel have, at various times, been included in and excluded from the populations of the States in which they maintained their homes of record. The discretion delegated to the executive branch to determine who qualifies as an ''inhabitant'' includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status.

In Executive Order 13880 of July 11, 2019 (Collecting Information About Citizenship Status in Connection With the Decennial Census), I instructed executive departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country. As the Attorney General and I explained at the time that order was signed, data on illegal aliens could be relevant for the purpose of conducting the apportionment, and we intended to examine that issue.

Sec. 2. *Policy.* For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch. Excluding these illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government. Affording congressional representation, and therefore formal political influence, to States on account of the presence within their borders of aliens who have not followed the steps to secure a lawful immigration status under our laws undermines those principles. Many of these aliens entered the country illegally in the first place. Increasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law. States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives. Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated.

I have accordingly determined that respect for the law and protection of the integrity of the democratic process warrant the exclusion of illegal aliens from the apportionment base, to the extent feasible and to the maximum extent of the President's discretion under the law.

Sec. 3. *Excluding Illegal Aliens from the Apportionment Base.* In preparing his report to the President under section 141(b) of title 13, United States Code, the Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary shall also include in that report information tabulated according to the methodology set forth in *Final 2020 Census Residence Criteria and Residence Situations,* 83 FR 5525 (Feb. 8, 2018).

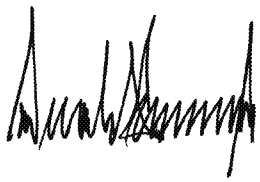
Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
Washington, July 21, 2020

[FR Doc. 2020–16216
Filed 7–22–20; 2:00 pm]
Billing code 3510–07–P

Sent: 12/13/2019 4:41:15 PM
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Subject: RE: proposed slides for CES Seminar
Attachments: attachment 1 CVAP discussion 12.13.19 + JF + SDO.pptx

My comments, for David's review now. In particular b(5) - DP/AC

b(5) - DP/AC

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My comments attached.

Best,
Jessica

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Subject: FW: proposed slides for CES Seminar

CUI/PRIV/FED ONLY

Team, here are the slides to be used in the seminar next week on CVAP. Let me know if you have any comments. If you have the time to review, perhaps we can discuss at the 11:00 tomorrow, although I know this is short notice.

Thanks!

Mike

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CUI / PRIV / FED ONLY

Mike,

Here are the proposed slides for the upcoming CES Seminar on CVAP.

Thanks,

Christa

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Subject: Re: Joe Schafer's proposed slides

Sent: 12/13/2019 4:05:51 PM
Subject: FW: New Lawsuit by Yale Law Clinic and Jenner & Block
Attachments: b(5) - DP/AC/WP

Importance: High

Sent: 7/24/2020 10:41:46 AM
Subject: FW: New civil action filed in connection with new memorandum
Attachments: 1_20cv2023, Common Cause Et Al V. Trump Et Al Complaint.pdf

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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Subject: FW: New civil action filed in connection with new memorandum
Attachments: 1_20cv2023, Common Cause Et Al V. Trump Et Al Complaint.pdf

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

COMMON CAUSE, CITY OF ATLANTA, CITY OF PATERSON, PARTNERSHIP FOR THE ADVANCEMENT OF NEW AMERICANS, ROBERTO AGUIRRE, SHEILA AGUIRRE, PAULA AGUIRRE, ANDREA M. ALEXANDER, DEBRA DE OLIVEIRA, SARA PAVON, JONATHAN ALLAN REISS, and MYRNA YOUNG,

Plaintiffs,

v.

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

UNITED STATES DEPARTMENT OF COMMERCE,

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

CHERYL L. JOHNSON, in her official capacity as the Clerk of the United States House of Representatives,

Defendants.

Case No. _____

COMPLAINT

INTRODUCTION

1. This is a complaint for declaratory judgment and injunctive relief against implementation of the Memorandum issued by President Donald J. Trump on July 21, 2020, titled "Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Memorandum"), on the grounds that the Memorandum violates Article I, § 2 of the U.S. Constitution as amended by § 2 of the Fourteenth Amendment; the Equal Protection guarantees of the Fifth and Fourteenth Amendments; and 2 U.S.C. § 2a(a) and 13 U.S.C. § 141.

2. The Memorandum purports to break with almost 250 years of past practice by excluding undocumented immigrants when calculating the number of seats to which each State is entitled in the House of Representatives. This new policy flouts the Constitution's plain language, which states that "[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting ***the whole number of persons in each state***," excluding only "Indians not taxed." U.S. Const., amend. XIV, § 2 (emphasis added). It also flies in the face of the statutory scheme governing apportionment, which requires the President to include "the ***whole number of persons in each State***" in the apportionment base—again, excluding only "Indians not taxed." 2 U.S.C. § 2a(a) (emphasis added).

3. Since the founding, the three branches of government have agreed that "the whole number of persons in each state" includes non-citizens, whether documented or undocumented. Now, for the first time in our nation's history, the President has purported to declare the opposite. As the Department of Justice observed in 1980, such a change would be "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."

4. President Trump's Memorandum is not an isolated event. Rather, it is the culmination of a concerted effort, stretching back at least five years, to shift the apportionment base from *total* population to *citizen* population—a strategy intended, in the words of its chief architect, to enhance the political power of "Republicans and non-Hispanic whites" at the expense of people of color, chiefly Latinos. The Memorandum is, in this respect, consistent with the Administration's attempt to add a citizenship question to the 2020 census—a ploy that the U.S. Supreme Court rejected as pretextual and unlawful. The Administration's latest effort should meet the same end.

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5. Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) to halt Defendants' violations of the Constitution and laws of the United States and to protect the right of all of this country's inhabitants to the equal protection of its laws.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, because this action arises under the Constitution and laws of the United States, and relief is authorized under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a).

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are United States agencies or officers acting in their official capacities or under color of legal authority, and Defendants reside in this District, or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District, or one or more Plaintiffs resides in this District.

8. This Court has personal jurisdiction over Defendants because Defendants are located within this District and Defendants' actions and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

9. Plaintiff Common Cause is a nonprofit organization organized and existing under the laws of the District of Columbia, with its principal place of business in the District of Columbia. Common Cause is a nonpartisan democracy organization with over 1.2 million members, 22 state offices, and a presence in all 50 states. It has members in all 50 states and in every congressional district. Since its founding by John Gardner fifty years ago, Common Cause

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has been dedicated to making government at all levels more representative, open, and responsive to the interests of ordinary people. It sues herein on behalf of its members.

10. Plaintiff City of Atlanta is the capital and most populous city in the State of Georgia, with a population of over half a million people. People of color constitute the majority of its population. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from East and South Asia, Africa, and the Caribbean.

11. Plaintiff City of Paterson is the county seat of Passaic County, New Jersey, with a population of approximately 150,000 people. It has a notably large population of immigrants, including Latino immigrants, as well as immigrants from Bangladesh, India, South Asia, and the Arab and Muslim world.

12. Plaintiff Partnership for the Advancement of New Americans (PANA) is a 501(c)(3) nonprofit based in San Diego, California with over 400 members. PANA is dedicated to advancing the full economic, social, and civic inclusion of refugees. It advocates for public policy solutions that will ensure local governments invest in the long-term economic self-sufficiency of newcomers and refugee families, including effective resettlement strategies and equitable allocation of federal resources. PANA provides support to communities directly affected by unjust immigration policies, including nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen who have resettled and continue to seek refuge in the San Diego region. In addition to its public policy advocacy, PANA engages more than 40,000 former refugee, African immigrant, Muslim, and Southeast Asian voters in elections throughout the San Diego region to ensure the fair representation of these historically underrepresented communities. It sues herein both on its own behalf and on behalf of its members.

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13. Plaintiff Roberto Aguirre is a naturalized U.S. citizen and a resident of Queens, New York City, New York. He is of Latino ethnicity and Ecuadorean national origin. He is a registered voter and regularly exercises his right to vote.

14. Plaintiff Sheila Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

15. Plaintiff Paula Aguirre is a natural-born U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean heritage. She is a registered voter and regularly exercises her right to vote.

16. Plaintiff Andrea M. Alexander is a natural-born citizen and a resident of Brooklyn, New York City, New York. Her racial identity is Black. She is a registered voter and regularly exercises her right to vote.

17. Plaintiff Debra de Oliveira is a naturalized U.S. citizen and a resident of Margate, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

18. Plaintiff Sara Pavon is a naturalized U.S. citizen and a resident of Queens, New York City, New York. She is of Latina ethnicity and Ecuadorean national origin. She is a registered voter and regularly exercises her right to vote.

19. Plaintiff Jonathan Allan Reiss is a naturalized U.S. citizen and a resident of Manhattan, New York City, New York. He is of Caucasian ethnicity and Canadian national origin. He is a registered voter and regularly exercises his right to vote.

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20. Plaintiff Myrna Young is a naturalized U.S. citizen and a resident of Fort Myers, Florida. Her racial identity is Black and her national origin is Guyanese. She is a registered voter and regularly exercises her right to vote.

21. Defendant Donald J. Trump is the current President of the United States of America. He is sued herein in his official capacity. Pursuant to statute, the President is responsible for transmitting the results of the decennial census, and the resulting congressional apportionment figures, to Congress.

22. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). Pursuant to statute, the Commerce Department is responsible for, among other things, implementing and administering the decennial census and transmitting the resulting tabulations to the President for further transmittal to Congress.

23. Defendant Wilbur L. Ross, Jr., is the Secretary of Commerce of the United States and a member of the President's Cabinet. He is responsible for conducting the decennial census and oversees the Census Bureau. He is sued herein in his official capacity.

24. Defendant Cheryl L. Johnson is the Clerk of the United States House of Representatives. Pursuant to statute, she is responsible for "send[ing] to the executive of each State a certificate of the number of Representatives to which such State is entitled" following a decennial reapportionment. 2 U.S.C. § 2a(b). She is sued herein in her official capacity.

FACTUAL ALLEGATIONS

A. Statutory Law Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

25. From the founding, the federal Constitution has required a decennial census (that is, an "actual Enumeration") to determine the apportionment of members of the U.S. House of

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Representatives among the States. The Constitution tasks Congress with passing legislation to "direct" the "manner" in which the census shall occur, subject to the requirements set forth in the Constitution itself. *See* U.S. Const., art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992).

26. By statute, Congress has assigned the responsibility of conducting the census to the Secretary of Commerce, and empowered the Secretary of Commerce to delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141; *Franklin*, 505 U.S. at 792.

27. To that end, the Census Bureau sends a questionnaire to every household in the United States, to which every resident in the United States (documented or otherwise) is legally required to respond. 13 U.S.C. § 221. The Census Bureau then counts responses from every household to determine the population count in the various states.

28. The Census Bureau's rules state that its enumeration procedures "are guided by the constitutional and statutory mandates to count ***all residents*** of the several states," including "[c]itizens of foreign countries living in the United States."[1]

29. Within nine months of the census date (in this case, by January 1, 2021), 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).

30. 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***

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[1] U.S. Census Bureau, *Residence Criteria and Residence Situations for the 2020 Census of the United States* at 1-2 (emphasis added), *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf (last accessed July 22, 2020).

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in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population." 2 U.S.C. § 2a(a) (emphasis added).

31. Second, based on the census count of the "whole number of persons in each State," the President must specify "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, no State to receive less than one Member." *Id.*

32. "Each State" shall thereupon "be entitled" to the number of representatives "shown in" the President's statement to Congress, "until the taking effect of a reapportionment under this section or subsequent statute." 2 U.S.C. § 2a(b). It is "the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the President's] statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled . . . ." *Id.*; *see Franklin*, 505 U.S. at 792.

33. The governing statute does not authorize the Secretary of Commerce to transmit to the President a number ***other than*** "the whole number of persons in each State," as determined by the census. Nor does it vest the President with discretion to base the apportionment calculation that he or she transmits to Congress on something ***other than*** "the whole number of persons in each State."

34. Indeed, in enacting this statute, members of Congress noted repeatedly that the President's role in calculating apportionment figures is ministerial—*i.e.*, that the statute directs the President "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 report "apportionment tables"

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to Congress "pursuant to a purely ministerial and mathematical formula"); 71 Cong. Rec. 1858 (1929) (statement of Sen. Vandenberg) (stating that the "function served by the President [under this statute] is as purely and completely a ministerial function as any function on earth could be").

35. The Supreme Court, too, has recognized that "the President ***exercises no discretion*** in calculating the numbers of Representatives," and that his or her role in the apportionment calculation is therefore "***admittedly ministerial***." *Franklin*, 505 U.S. at 799 (emphasis added).

36. The Executive Branch has similarly conceded the exclusively ministerial nature of the President's role in translating the census data to an apportionment determination. *See* Reply Br. for the Federal Appellants at 24, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 20, 1992), 1992 U.S. S. Ct. Briefs LEXIS 390 ("[I]t is true that the method [prescribed by 2 U.S.C. § 2a] calls for application of a set mathematical formula to the state population totals produced by the census"); Transcript of Oral Argument at 12-13, *Franklin v. Massachusetts*, No. 91-1502 (U.S. Apr. 21, 1992) (argument of Deputy Solicitor General Roberts) ("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.'").

B. The Constitution Requires the President to Include All Persons in the Congressional Apportionment Base, Irrespective of Citizenship or Immigration Status

37. From the founding of our nation, all three branches of government have agreed that, independent of statutory law, the Constitution itself requires that the census count ***all*** "persons" residing in each State, irrespective of citizenship or immigration status, and that ***all*** such "persons" be included in the congressional apportionment base.

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38. As originally ratified, Article I, Section 2 of the Constitution provided that "Representatives . . . shall be apportioned among the several states which may be included within this union, 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 [*i.e.*, slaves]" (emphasis added). This infamous "Three-Fifths Compromise" did not exclude free non-citizens, who as a matter of plain meaning are "persons," from the apportionment base.

39. The Fourteenth Amendment was ratified following the Civil War. That amendment eliminated the "three-fifths" clause, but otherwise "retained total population as the congressional apportionment base." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016). Specifically, Section 2 of the Fourteenth Amendment provides 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" (emphasis added).

40. During the debates over the Fourteenth Amendment, Congress considered revising the apportionment formula to exclude persons ineligible to vote—a category which, Congress expressly recognized, included the "unnaturalized foreign-born." Cong. Globe, 39th Cong., 1st Sess., 1256 (1866) (remarks of Sen. Wilson). This proposal was soundly rejected, on the ground that "non-voting classes"—including unnaturalized immigrants—"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)).

41. On several occasions since the Fourteenth Amendment's passage, Congress has considered measures to exclude "aliens," including undocumented immigrants, from the census count and/or apportionment base. "[I]t appears to have been generally accepted that such a result

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would require a constitutional amendment." *Fed. For Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576-77 (D.D.C.) (three-judge court), *appeal dismissed*, 447 U.S. 916 (1980).

42. In 1929, for example, the Senate Legislative Counsel concluded that, absent such an amendment, "statutory exclusion of aliens from the apportionment base would be unconstitutional." *Id.* (citing 71 Cong. Rec. 1821 (1929)).

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

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. 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. The only way we can exclude them would be to pass a constitutional amendment.

Id. (emphasis added). On this basis, Congress rejected a proposal to exclude "aliens" from the apportionment base. *See id.*

44. The Executive Branch, too, has repeatedly recognized—under Presidents of both parties—that the Constitution requires that congressional apportionment take place on the basis of total population, irrespective of citizenship or immigration status.

45. For example, in 1980, under President Jimmy Carter, private plaintiffs filed a lawsuit in this District seeking to exclude "illegal aliens" from the census and the congressional apportionment base. *Klutznick*, 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

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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).

46. "[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.

47. In 1988, under President Ronald Reagan, the Director of the Office of Management and Budget sought the views of the DOJ on yet another proposal to exclude "illegal aliens" from congressional apportionment base. The DOJ concluded that the proposed legislation was "unconstitutional." Letter from Thomas M. Boyd, Acting Assistant Attorney General, dated June 29, 1988, at 5.[2] 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 congressional apportionment base. *Id.* at 2 (emphasis added). In fact, the DOJ noted, 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.

48. In its 1988 opinion, the DOJ went on to explain that, for apportionment purposes, the Fourteenth Amendment makes no distinction between "aliens" who are and are not lawfully

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[2] *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, One Hundredth Congress, Second Session, June 24, 1988 at 240 (United States: U.S. Government Printing Office 1988).

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present in the United States. Furthermore, DOJ explained, in analyzing the Fourteenth Amendment, "the Supreme Court . . . has read the word 'person' to include illegal aliens." *Id.* at 3-4 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

49. In 1989, under President George H. W. Bush, the DOJ issued a similar opinion. Once again, a Senator had "requested the views of the Department of Justice concerning the constitutionality of proposed legislation excluding illegal or deportable 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 provides 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). At that time, current Attorney General William Barr was the head of DOJ's Office of Legal Counsel. In that position, he would be expected to have reviewed and approved the DOJ opinion.

50. In 2015, under 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. 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.

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51. The judiciary, too, has long echoed this consensus. For over fifty years, the U.S. 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." *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964).

52. Just four years ago, the Supreme Court unanimously 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. Because immigration was at the center of the controversy in *Evenwel*,[3] it is beyond question that the Supreme Court had non-citizen immigrants in mind when it made this declaration.

53. Lower courts, too, have determined that "illegal aliens . . . are clearly 'persons'" for purposes of congressional apportionment, and that "the population base for purposes of apportionment" must therefore "include[] all persons, ***including aliens both lawfully and unlawfully within our borders***." *Klutznick*, 486 F. Supp. at 576 (emphasis added).

54. To Plaintiffs' knowledge, no court has ever held otherwise.

C. In Violation of Statute and the Constitution, The President Has Purported to Exclude Undocumented Immigrants from Congressional Apportionment

55. On July 21, 2020, without any advance notice to the public, the President issued a proclamation titled "Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census" (the "Memorandum").[4] Breaking with almost 250 years of

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[3] *See, e.g.*, Brief of Eagle Forum as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 2, 2015 U.S. S. Ct. Briefs LEXIS 2687 (complaining of the "influx of non-citizens in[to] urban areas"); Brief of Immigration Reform Law Institute as *Amicus Curiae* for Appellants, *Evenwel v. Abbott*, No. 14-940, at 1, 2015 U.S. S. Ct. Briefs LEXIS 2724 (complaining of the "harms . . . posed by mass migration to the United States, both lawful and unlawful").

[4] *Available at* https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/ (last accessed July 23, 2020).

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precedent, the Memorandum declares 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, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible . . . ." Memorandum § 2.

56. To implement that purported "policy," the Memorandum states that, when the President "transmits . . . to the Congress" his report "regarding the 'whole number of persons in each State'" and the consequent "number of Representatives to be apportioned to each State," he will unilaterally "exclude . . . aliens who are not in a lawful immigration status" from the figures that he transmits. *Id.* §§ 1, 2. 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." *Id.* § 1.

57. To enable the President to prepare this manipulated apportionment, the Memorandum orders the Secretary of Commerce to "take all appropriate action . . . to provide information permitting the President . . . to carry out the policy set forth in . . . this memorandum." *Id.* § 3. Presumably, this includes providing the President with "data on the number of citizens, non-citizens, and illegal aliens in the country," which the President had earlier commanded the Department of Commerce to collect to permit the President to accomplish this purpose. *Id.* § 1 (citing Executive Order 13880, July 11, 2019).

58. The Memorandum makes no serious attempt to square the President's new "policy" with the governing statutory and constitutional provisions described above or with over two centuries of contrary practice. Instead, the Memorandum purports to justify this "policy" based on the President's own view that "[e]xcluding . . . illegal aliens from the apportionment

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base is more consonant with the principles of representative democracy underpinning our system of Government." *Id.* § 2. The Memorandum also relies on the unexceptional premise that transient ***visitors*** to a State are not included in census numbers to argue that ***inhabitants*** of a state can be excluded based on their immigration status.

59. The President is not free to substitute his own personal judgment for those that have already been made by the Congress that enacted 2 U.S.C. § 2a and by the framers and ratifiers of Article I, § 2 and the Fourteenth Amendment. As explained above, the President's duty in preparing and transmitting the apportionment calculations to Congress is purely ministerial. There is no room under the statutory scheme for his exercise of judgment concerning what is most "consonant with the principles of representative democracy." And even if the statutory scheme permitted the President to exercise such judgment, he would of course be restrained by the Constitution's clear command.

D. The Memorandum is the Latest in a Series of Unlawful Attempts to Manipulate Apportionment to Deprive Minorities of Political Power

60. The Memorandum is not the first time that this Administration has sought to manipulate the census and apportionment process to deprive immigrants and racial and ethnic minorities of political power. To the contrary, it is the latest in an interconnected series of unlawful actions that this Administration has taken for that purpose.

61. The planning for these actions predated the start of this Administration. In August 2015, the now-deceased Republican redistricting guru Thomas B. Hofeller prepared a secret study for a major Republican donor titled "The Use of Citizen Voting Age Population in

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Redistricting" (the "Hofeller Study").[5] According to the New York Times, Hofeller had already "achieved near-mythic status in the Republican party as the Michelangelo of gerrymandering, the architect of partisan political maps that cemented the party's dominance across the country."[6] The Hofeller Study fortuitously came to light only after he died and his estranged daughter made his personal storage devices available to Plaintiff Common Cause.

62. In his study, Hofeller concluded that "[a] switch to the use of citizen voting age population as the redistricting population base"—in lieu of total population, as presently used—"would be ***advantageous to Republicans and non-Hispanic whites***" and would dilute the political power of Hispanics. Hofeller Study at 9 (emphasis added). The problem, Hofeller explained, was that insufficient information was available to accurately determine the States' citizen voting-age population for purposes of reapportionment. Without "add[ing] a citizenship question to the 2020 Decennial Census form," he concluded, such a switch would be "functionally unworkable." *Id.* at 4.

63. Notably, the Hofeller Study addressed only the possibility of changing the population base for *state*-level redistricting. This is because Hofeller knew that the Constitution and federal law expressly require use of total population as an apportionment base at the *federal* level. Even in his most ambitious private scheming, Hofeller did not imagine that the apportionment base for the U.S. Congress could be changed.

64. When Defendant Trump was elected to the presidency in 2016, Hofeller "urg[ed] [his] transition team to tack the [citizenship] question onto the census." The transition staffer

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[5] *Available at* https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf (last accessed July 23, 2020).

[6] Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, New York Times, May 30, 2019, *available at* https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html (last accessed July 23, 2020).

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with whom Hofeller spoke then discussed the issue with Defendant Ross and his advisors several times in the early days of the Administration. Soon thereafter, Hofeller ghostwrote "the key portion of a draft Justice Department letter" that claimed—falsely, and with no small amount of irony—that "the [citizenship] question was needed to enforce the 1965 Voting Rights Act," a statute intended to protect the political power of racial and ethnic minorities.[7]

65. The rest is already well-known. *See generally Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). In March 2018, Defendant Ross, in his capacity as Secretary of Commerce, announced his intent "to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Id.* at 2562. Ross "stated that he was acting at the request of the [DOJ], which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act . . . ." *Id.*

66. Of course, this rationale was pretextual. The real reason for Ross's decision was that stated by Hofeller in his 2015 study: to provide the data necessary to enable the change in apportionment base from total population to citizen voting-age population, and thereby maximize the political power of "Republicans and non-Hispanic whites."

67. Shortly after Ross announced his decision, two groups of plaintiffs filed suit to block the citizenship question. After a bench trial, a federal district court in New York ruled (among other things) "that the Secretary's action was arbitrary and capricious" and "based on a pretextual rationale." *Id.* at 2564. The Supreme Court granted certiorari before judgment and affirmed, agreeing with the district court that "the Secretary's decision must be set aside because it rested on a pretextual basis." *Id.* at 2573.

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[7] Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, *supra*.

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68. In particular, the Supreme Court found that "the [Voting Rights Act] played an insignificant role in the decisionmaking process." *Id.* at 2574. 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, invidious motive. *Id.* at 2575-76.

69. 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."[8]

70. With the citizenship question now quashed, however, the Administration sought another way to implement their goal of changing the apportionment base to shift political power to "Republicans and non-Hispanic whites." Thus, on July 11, 2019—six days after his press-conference remarks—the President issued Executive Order 13880, titled "Collecting Information About Citizenship Status in Connection with the Decennial Census." 84 Fed. Reg. 33821.

71. In that Executive Order, the President recognized that it was now "impossible . . . to include a citizenship question on the 2020 decennial census questionnaire." *Id.* Instead, as a backup plan, the President "determined that it is imperative that all executive departments and agencies . . . provide the [Commerce] Department the maximum assistance permissible . . . in

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[8] Remarks by President Trump Before Marine One Departure, July 5, 2019, *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/ (last accessed July 23, 2020).

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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." *Id.* To that end, the President "order[ed] all agencies to share information requested by the [Commerce] Department." *Id.* at 33822. He also "direct[ed] the Department to strengthen its efforts . . . to obtain State administrative records concerning citizenship." *Id.*

72. For the first time, the President specifically called out the importance of "generat[ing] an estimate of the aggregate number of aliens ***unlawfully*** present in each State." *Id.* at 33823 (emphasis added). In addition, the President once again openly acknowledged the true reason why, from the outset, his Administration had been so intently set on collecting citizenship data: not improving enforcement of the Voting Rights Act, but rather, enabling Hofeller's plan to "design . . . legislative districts based on the population of voter-eligible citizens," rather than total population. *Id.* at 33823-24.

73. There is a clear through-line running through all of the above actions and decisions: from Hofeller's original 2015 plan to change the basis of apportionment, which required new citizenship data; to Ross's decision—at Hofeller's urging—to place a citizenship question on the census, while giving a pretextual reason to mask his true motive; to the President's Executive Order instructing the Commerce Department to collect citizenship data through alternate means; to the President's recent Memorandum purporting to unilaterally shift the basis of congressional apportionment. All of these actions are part of an unconstitutional concerted effort to shift political power away from racial and ethnic minorities, chiefly Latinos, to "Republicans and non-Hispanic whites."

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E. Plaintiffs' Injuries as a Result of the Challenged Conduct

74. The unlawful conduct alleged herein has caused, is causing, and unless enjoined, will cause Plaintiffs to suffer various injuries in fact.

75. As recognized in the Hofeller Study, removing undocumented immigrants from the apportionment base "alienat[es] Latino voters" and other voters of color, who "perceive [such] a switch . . . as an attempt to diminish their voting strength." Hofeller Study at 4. In addition to inflicting alienation, it does, in fact, diminish the voting strength of these groups. *See id.* at 6-7.

76. As alleged above, many of the individual Plaintiffs are voters of color, as are many members of the organizational Plaintiffs and many residents of the city Plaintiffs. These include Latinos, African-Americans, Asian-Americans, and voters of other racial and ethnic backgrounds. These voters have suffered dignitary harm as a result of Defendants' challenged actions. They are also certain to suffer diminished voting strength if those actions are not enjoined.

77. Removing undocumented immigrants from the apportionment base also dilutes the votes and diminishes the representational rights of ***citizens***—of all races and ethnicities—who live in jurisdictions with an above-average number of undocumented immigrants. *See* Hofeller Study at 6. As the Department of Justice has previously argued, "[i]t would be patently unfair to penalize" these citizens "by depriving them of fair representation in Congress" and diluting their voting strength merely because "a certain number of members of their community are . . . in the class of potentially deportable aliens." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

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78. Many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer vote dilution and diminished representational rights if Defendants' challenged actions are not enjoined.

79. The President has already acknowledged as much. The Memorandum expressly notes that one state—California—has "more than 2.2 million illegal aliens" and that the exclusion of those undocumented immigrants from the apportionment base could cost California "two or three . . . congressional seats." Memorandum § 2. Plaintiffs Common Cause and PANA have members residing in California whose votes would be diluted and who would lose representation under the Memorandum's apportionment regime.

80. By the same token, the State of New York had approximately 725,000 undocumented immigrants in 2016, a number that has likely increased since then.[9] If implemented, the Memorandum's apportionment regime would likely result in the loss of one of New York's congressional seats, as each seat in New York presently corresponds to approximately 719,000 people.[10] As alleged above, a number of the individual Plaintiffs reside in New York, as do many members of Plaintiff Common Cause. Their votes would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

81. Similarly, the State of Georgia has approximately 400,000 undocumented immigrants—enough to potentially cost the State one congressional seat if they were not

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[9] American Immigration Council, *Fact Sheet: Immigrants in New York*, https://www.americanimmigrationcouncil.org/research/immigrants-in-new-york (last accessed July 23, 2020).

[10] *2012 – 2020 Federal Representation by People per House Seat, Senate Seat, and Electors*, The Green Papers, https://www.thegreenpapers.com/Census10/FedRep.phtml (last accessed July 23, 2020).

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counted.[11] Plaintiff City of Atlanta is located in Georgia, as are many members of Plaintiff Common Cause. The votes of their residents and members would be diluted, and they would lose representation, under the Memorandum's apportionment regime.

82. In addition, as the Department of Justice has recognized, removing undocumented immigrants from the apportionment base "require[s]" residents of areas with an above-average number of undocumented immigrants—including residents who are U.S. citizens—"to assume a greater burden of the cost of state and municipal services" merely because the President has now "determined that a certain percentage of the residents of their community do not exist for purposes of allocation of federal census-based fiscal assistance." Federal Defendants' Post-Argument Mem. at 12, *FAIR v. Klutznick*, No. 79-3269 (D.D.C. filed Feb. 15, 1980).

83. Again, many of the individual Plaintiffs, many members of the organizational Plaintiffs, and many residents of the city Plaintiffs live in areas with an above-average number of undocumented immigrants. These persons are certain to suffer fiscal burdens, including increased costs of state and municipal services, if the challenged actions are not enjoined.

84. These increased costs would be felt especially acutely by the city Plaintiffs, which must necessarily provide municipal services to citizens, documented immigrants, and undocumented immigrants on an equal basis. *See, e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (noting that "police, fire, and health protection" are "basic municipal services" whose delivery to all residents is a "city's responsibility"); *Plyler*, 457 U.S. 202 (holding that the right to a free public education extends to minor undocumented immigrants).

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[11] American Immigration Council, *Fact Sheet: Immigrants in Georgia*, https://www.americanimmigrationcouncil.org/research/immigrants-in-georgia (last accessed July 23, 2020).

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85. For example, the State of Georgia reportedly has the seventh-largest number of undocumented immigrants in the United States, many of them concentrated in the city of Atlanta. If undocumented immigrants were removed from the apportionment base, Plaintiff City of Atlanta would have to continue to provide these municipal services to those residents without receiving federal resources and representation commensurate with their numbers.

86. Plaintiff PANA, moreover, would suffer certain harm to its organizational mission if the challenged actions are not enjoined. Again, PANA's mission centers around providing support to immigrant communities, including foreign nationals who have resettled and continue to seek refuge in the San Diego region. Because the San Diego region has a higher-than-average number of undocumented immigrants, removing undocumented immigrants from the apportionment base would reduce the federal resettlement resources directed to that region—resources on which PANA depends to carry out its mission.

87. Importantly, whatever figures the President transmits to Congress in January 2021, the issuance of the Memorandum is ***already*** inflicting irreparable injury on Plaintiffs. The census count is ongoing and is not expected to conclude until the end of October.[12] At this moment, the Memorandum is causing fear and confusion among the immigrant population and reducing the likelihood that immigrants (both documented and undocumented) will respond to the census survey.[13] Unless Defendants' actions are declared unlawful and void now, before the

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[12] *Important Dates*, United States Census 2020, https://2020census.gov/en/important-dates.html (last accessed July 23, 2020).

[13] *See, e.g.*, *Exclusion of undocumented immigrants from the Census is unconstitutional*, El Sol Latino, July 22, 2020, https://elsolnewsmedia.com/jim-kenney-exclusion/ (last accessed July 23, 2020) (reporting statement of the mayor of Philadelphia that the Memorandum "appears targeted to suppress census participation and create fear and confusion among undocumented immigrant communities"); Kendall Ashman, *President's memo to exclude undocumented immigrants from 2020 census apportionment count*, ABC 40/29 News, July 22, 2020, https://www.4029tv.com/article/presidents-memo-to-exclude-undocumented-immigrants-from-2020-census-apportionment-count/33397647# (last accessed July 23,

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conclusion of the count, the results of the census—and the consequent impact on congressional apportionment—will be irretrievably altered. It will be too late to remedy these harms in January 2021, when President is scheduled to transmit the results of the count to Congress.

COUNT I
Violation of U.S. Const., Art. I, § 2, cl. 3 and U.S. Const., amend. XIV, § 2

88. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

89. As set forth above, Art. I, § 2, cl. 3, as modified by Section 2 of the Fourteenth Amendment, provides 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.

90. Since the Founding, all three branches of the federal government have consistently agreed that "the whole number of persons in each state" includes non-citizens, irrespective of their immigration status—and, consequently, that non-citizens must be counted in the census and included in the basis for congressional apportionment.

2020) (reporting view of Arkansas immigrant organization that "the president's memo will potentially scare immigrant communities from taking part" in the census count); Alexandra Watts, *Charlotte Reacts to Trump's Proposed Census Changes*, WFAE, July 22, 2020 https://www.wfae.org/post/charlotte-reacts-trumps-proposed-census-changes-0#stream/0 (last accessed July 23, 2020) (reporting that "[m]embers of North Carolina's Latino community say those who are in the country illegally will be even more fearful of filling out the 2020 census after President Trump released [the Memorandum]"); *Trump excluding those in US illegally from reapportionment*, Adirondack Daily Enterprise, July 22, 2020, https://www.adirondackdailyenterprise.com/news/politics/2020/07/trump-excluding-those-in-us-illegally-from-reapportionment/ (last accessed July 23, 2020) (reporting that the Memorandum has "dr[awn] fury and backlash from critics who alleged that it was intended to discourage participation in the [census] survey, not only by people living in the country illegally but also by citizens who fear that participating would expose noncitizen family members to repercussions"); Micah Danney, *SPLC calls Trump census memo unlawful and unconstitutional*, Alabama Reporter, July 22, 2020, https://www.alreporter.com/2020/07/22/splc-calls-trump-census-memo-unlawful-and-unconstitutional/ (last accessed July 23, 2020) (reporting statement of the Southern Poverty Law Center that "the memo will cause widespread confusion and deter people from participating in the census").

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91. By purporting to exclude undocumented immigrants from the basis for congressional apportionment, the President has violated Art. I, § 2, cl. 3 of the U.S. Constitution and Section 2 of the Fourteenth Amendment to the U.S. Constitution.

92. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT II
Violation of Equal Protection Clause – Vote Dilution and Representational Injury

93. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

94. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

95. In particular, the Equal Protection clause prohibits the government from taking action in the apportionment process that dilutes or debases the weight of a voter's vote based on the happenstance of where that voter lives. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

96. By purporting to exclude undocumented immigrants from the congressional apportionment base, Defendants have unlawfully diluted Plaintiffs' votes (or the votes of their members and/or residents) by requiring them to live and vote in congressional districts with a population that is higher than an equal proportion of persons as determined by the census and as required by the Constitution. Similarly, Defendants have caused Plaintiffs (or their members and/or residents) to suffer representational injury by forcing them to compete for their

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Representative's limited attention and resources with an artificially high number of fellow-constituents.

97. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

COUNT III
Violation of Equal Protection Clause – Invidious Discrimination

98. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

99. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made applicable to the federal government via 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.

100. In particular, the Equal Protection Clause prohibits the government from taking adverse action against any person on the basis of race, ethnicity, or national origin. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). This prohibition extends to the apportionment process, and encompasses not only "explicit racial classifications, but also . . . laws neutral on their face but 'unexplainable on grounds other than race.'" *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

101. As alleged above, the President's Memorandum is the culmination of a years-long effort to transfer political power *en masse* from voters of color—chiefly, but not exclusively, Latino voters—to "Republicans and non-Hispanic whites." In other words, the Memorandum, and the policy changes embodied therein, was motivated by intentional invidious discrimination on the basis of race, ethnicity, and/or national origin.

102. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

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COUNT IV
Violation of 2 U.S.C. § 2a and 13 U.S.C. § 141

103. Plaintiffs incorporate by reference and reallege all allegations set forth in the preceding paragraphs.

104. As set forth above, 13 U.S.C. § 141(b) requires the Secretary of Commerce to transmit to the President "the tabulation of ***total population*** by States . . . as required for the apportionment of Representatives in Congress."

105. Thereafter, 2 U.S.C. § 2a(a) requires the President to transmit to Congress "a statement showing the ***whole number of persons*** in each State . . . as ascertained under the . . . decennial census" and "the number of Representatives to which each State would be entitled" applying the so-called "method of equal proportions" to ***that*** "whole number of persons."

106. These statutes do not authorize the Secretary of Commerce to transmit to the President any number ***other*** than the "total population by States." Nor do they authorize the President to transmit to Congress, or to calculate apportionment based on, any number ***other*** than the "whole number of persons in each State . . . as ascertained under the . . . decennial census."

107. The President's statutory role in this calculating the apportionment figures is purely ministerial and neither calls for, nor permits, the President's exercise of discretion with regard to the proper apportionment basis or the proper underlying theory of democratic representation.

108. By purporting to require the Secretary of Commerce to transmit to the President population figures concerning or adjusted to exclude undocumented immigrants, and by purporting to exclude undocumented immigrants in the apportionment of congressional representatives, the President has violated 2 U.S.C. § 2a(a) and has commanded the Secretary of Commerce to violate 13 U.S.C. § 141(b).

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109. These violations have caused, are causing, and unless Defendants are enjoined, will continue to cause Plaintiffs to suffer injury-in-fact as alleged above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for injunctive and declaratory relief as requested above under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a), and more specifically pray for:

A. A declaration that the Memorandum, and the other actions challenged herein, are unauthorized by and contrary to the Constitution and laws of the United States, and therefore are null, void, and without force;

B. A preliminary injunction and permanent injunction halting and restraining Defendants' violations of the U.S. Constitution and laws of the United States alleged herein, by ordering, among other things:

1. That Defendant Ross, Defendant U.S. Department of Commerce, and their employees and agents (a) not transmit to the President any data regarding citizenship or immigration status; (b) not transmit to the President any census-related data or calculation other than the whole number of persons residing in each State, excluding Indians not taxed; and (c) provide no support or assistance of any kind to the President in carrying out his stated intent to exclude persons from his enumeration and apportionment determinations on the basis of citizenship or immigration status;

2. That Defendant Trump include all of the inhabitants of each State, excluding Indians not taxed, without respect to such inhabitants' citizenship or immigration status, in the enumeration and apportionment calculations that he prepares and transmits to Congress; and

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3. That Defendant Johnson neither certify nor transmit to the States any purported apportionment determination by the President that excludes persons from the apportionment base on the basis of their citizenship or immigration status.

C. An award of Plaintiffs' reasonable fees, costs, and expenses, including attorney's fees, pursuant to 28 U.S.C. § 2412; and

D. Such other and further relief as the Court may deem just and proper.

DATED: July 23, 2020

/s/ *Daniel S. Ruzumna*

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

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; and U.S. CENSUS BUREAU,

Defendants.

CASE NO. 20-cv-5799

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the "Bureau") Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.

2. The Census Bureau's staff spent most of the past decade developing a final operational plan for the 2020 Census that reflected the Bureau's understanding of the best methods for counting everyone once and in the right place (the "Final Operational Plan"). In April 2020, as the COVID-19 pandemic spread throughout the country, the Census Bureau revised its plan to account for both the difficulties of census-taking during a pandemic and the Bureau's constitutional and statutory obligation to achieve a fair and accurate count (the "COVID-19 Plan"). To achieve both ends, the Department of Commerce and the Census Bureau delayed the counting process, shifted the timeframe for conducting and completing its data-collection operation, and increased the time for conducting data-processing, while, crucially, preserving the same amount of time for each step of those operations.

3. On August 3, 2020, the Department of Commerce and the Census Bureau suddenly and without explanation reversed course and replaced the Bureau's COVID-19 Plan with a new one (the "Rush Plan"). The Bureau's Rush Plan requires the Bureau to complete eight and a half months of data-collection and data-processing in half the time. It ignores the multi-month delay in census data-collection that the COVID-19 pandemic caused. It compels a final date for delivering apportionment data to the President that Bureau officials have repeatedly asserted they cannot meet. And it threatens a massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live. Under these circumstances, the Bureau's new plan to rush the 2020 Census violates, among other things, the federal government's legal obligations to secure an accurate count and statutory prohibitions on arbitrary, capricious, and pretextual federal government action.

4. The federal government's attempt to rush the census count poses a grave threat to

all the vital functions that rely on census data, from reapportioning the United States House of Representatives and redrawing state and local electoral districts, to equitably distributing over $1.5 trillion annually in federal funds that support basic needs such as food, health care, and education. Undercounted cities, counties, and municipalities will lose representation in Congress and tens of millions of dollars in funding. And communities of color will lose core political power and vital services. In contrast to these dire stakes, the immediate solution to this problem is simple: set aside and enjoin implementation of the impossibly-shortened Rush Plan, which is based on an unexplained change of position, and allow the Census Bureau to implement the plan that it had designed to fulfill its constitutional duties during the pandemic.

5. The COVID-19 pandemic upended all 2020 Census field operations, many of which the Census Bureau designed to enumerate populations that it has long struggled to count, including racial and ethnic minorities, non-English speakers, and undocumented persons. Among the disrupted census operations was the largest, most time-consuming operation undertaken to count the country's hard-to-count communities—the "Non-Response Follow Up" operation. During Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census and perform other vital data-collecting functions.

6. The Bureau's staff responded to the pandemic—and the impossibility of conducting house visits during widespread lockdowns—by making necessary adjustments to the timeline in the Final Operational Plan. This revised operational plan, the COVID-19 Plan issued on April 13, 2020, was intended to ensure that hard-to-count communities would be enumerated and the health and safety of Bureau employees and the public would be protected. This plan adjusted the deadlines of, but did not shorten the time for, critical operations. Under this plan—which experts and census stakeholders alike endorsed as a scientifically sound approach for minimizing the pandemic's potential damage to the accuracy of the count—the Bureau extended its data-collection deadlines to October 31, 2020 and its data-processing deadlines into the second quarter of 2021. Critically, the COVID-19 Plan delayed door-knocking by three months, pushing it from May–July 2020 to August–October 2020. But the COVID-19 Plan

acknowledged that the Bureau must spend the same amount of time—around eleven and a half weeks—on door-knocking, just as it had planned to do before the pandemic. The COVID-19 Plan also incorporated the same methods and techniques contemplated in the Final Operational Plan that the Bureau had spent years developing. Indeed, the only respect in which the COVID-19 Plan altered the amount of time devoted to operations set out in the Final Operational Plan was a requirement that the Bureau spend *more* time than originally planned *processing* the data it collected—that is, performing the necessary work to transform over 100 million individual census forms into high-quality, reliable, and legitimate data. This additional investment in data-processing reflected daunting new challenges the COVID-19 pandemic posed to an accurate count, including massive displacements of people that would introduce problems of duplicate responses, responses without unique census identifiers, and other complex data issues.

7. The Department of Commerce and the Census Bureau also recognized that the impact of COVID-19 had made it impossible to meet certain statutory deadlines for reporting census results to Congress. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham announced that the Bureau was seeking relief from Congress to formally extend two statutory deadlines: first, the deadline for reporting the state-population totals used to calculate the congressional apportionment to the President, which Congress was asked to extend from December 31, 2020 to April 30, 2021; and, second, the deadline for reporting redistricting data to the states, which Congress was asked to extend from March 31, 2021, to July 31, 2021. Commenting on the statutory-deadline extensions, President Trump publicly stated on April 13, 2020, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

8. Recognizing that more time was necessary to complete an accurate census, and consistent with the President's statement, the Bureau proceeded immediately under its COVID-19 Plan. The Bureau delayed its door-knocking operation to late summer, with the declared

intention of completing it by October 31, 2020. And recognizing that a successful census is dependent on all levels of government working together, the Bureau publicized this plan to the public, as well as to government and non-profit partners involved in the years-long and multi-million-dollar public education campaign to ensure public trust and encourage public participation in the census.

9. Throughout the summer, Bureau officials repeatedly stated that the pandemic had rendered it impossible for the Bureau to complete a reasonably accurate count by December 31, 2020. But to comply with its constitutional obligations, the Bureau continued collecting data on the timelines set in the COVID-19 Plan, which itself extended the Bureau's data-processing timelines into 2021.

10. On August 3, 2020—in the face of a pandemic that has only grown worse and in disregard of the Census Bureau's constitutional and statutory duties to conduct an actual enumeration of the entire population—Secretary Ross and Director Dillingham abruptly abandoned the COVID-19 Plan. Without explanation, they announced the new Rush Plan for the 2020 Census, including shortening the Bureau's data-collection operation by one month to September 30, 2020, and requiring the Bureau to process and report the apportionment data to President Trump by December 31, 2020. The Rush Plan cuts a crucial four weeks from the data-collection operation. And it disregards the Bureau's own prior conclusions that such rushed processing renders it impossible to fulfil its constitutional obligation to ensure reasonable quality and accuracy of 2020 Census data.

11. Defendants' decision to abandon the COVID-19 Plan in favor of the Rush Plan does not satisfy the Supreme Court's clear command that any decision relating to the census bear a "reasonable relationship" to producing an accurate count. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). As demonstrated by Defendants' own prior statements, the challenged decision cannot be justified by any legitimate interest in conducting an accurate census, and in fact will introduce several inaccuracies in the count, chief among them major undercounts of communities of color.

12. The reason for this abrupt change of position is not apparent on the face of the

press release announcing the Rush Plan or any other subsequently issued statements or publications from the federal government. The Bureau has refused requests from Congress and at least one Plaintiff in this action to provide one.

13. The announcement of the Rush Plan did reference two developments that occurred between the adoption of the COVID-19 Plan and the announcement of the Bureau's intent to adopt the Rush Plan. But neither of these developments can justify Defendants' actions. First, the announcement refers to the Secretary of Commerce's direction to the Bureau to comply with the statutory deadline of December 31, 2020 for completing the apportionment count. But this statutory deadline cannot justify an unconstitutional decision to cut short crucial operations and fail to satisfy its constitutional obligation. A statutory deadline, particularly one that was set without a global pandemic in mind, cannot override the federal government's constitutional duty to accomplish an accurate census; there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980). Moreover, the Bureau was cognizant of this deadline even as it designed and implemented the COVID-19 Plan, including delaying crucial field operations by several months. And Bureau officials have repeatedly made clear that because of the impediments introduced by COVID-19, together with the multi-month delay, it is *already* too late to satisfy these pre-COVID-19 deadlines.

14. Second, both the text of the Rush Plan announcement and the timing of the decision suggest that the federal government's motivation for the Rush Plan is to facilitate another illegal act: suppressing the political power of communities of color by excluding undocumented people from the final apportionment count. On July 21, 2020—just a few weeks earlier—President Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order")—which expressly stated the President's determination to exclude undocumented people from the population count used for apportionment. To increase the chance that the President can fully effectuate the Apportionment Exclusion Order, he must receive the population totals while he is still in office, and he ordered the Secretary of Commerce to provide

him with 2020 decennial census information by December 31, 2020 to carry out his objective.

15. The President's Apportionment Exclusion Order (currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District) represents only the most recent of Defendants' serial attempts to manipulate the 2020 Census to suppress the political power of communities of color. These attempts started with a campaign to introduce a historically unprecedented and untested citizenship question onto the 2020 Census questionnaire to advantage—in the words of a deceased Republican redistricting consultant—"Republicans and non-Hispanic whites." Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. Since the Supreme Court blocked the question, Defendants have looked for other means to achieve that same end, including collecting data on citizenship from administrative records and, now, cutting the census short.

16. Plaintiffs are local governments, civil rights and civic organizations, and individuals whose communities will almost certainly be inaccurately represented and underrepresented in the final census count if the administration succeeds in truncating census data-collection and data-processing.

17. Plaintiffs seek declaratory relief affirming that Defendants' actions violate the Enumeration Clause and the Administrative Procedure Act. Plaintiffs additionally seek to set aside and enjoin implementation of the illegal Rush Plan, thereby permitting the Bureau to implement the preexisting COVID-19 Plan it carefully designed to ensure a complete and accurate count. This relief will allow the Bureau to conduct the 2020 Census on the timeline it has repeatedly asserted is necessary to complete a full, fair, and accurate count.

18. Without such relief, Plaintiffs and the communities they represent will suffer irreparable harm for at least another decade, until the next census is conducted.

JURISDICTION AND VENUE

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

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

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

22. The proper intradistrict assignment for this action is the San Jose Division, in light of the location of Plaintiffs City of San Jose and members of the League of Women Voters.

PARTIES

I. Plaintiffs

23. The National Urban League ("Urban League") is a civil-rights organization with over 90 affiliates serving 300 communities in 37 states and the District of Columbia. Founded in 1910, the National Urban League is headquartered in New York City. The mission of the National Urban League is to help African Americans and others in underserved communities achieve their highest human potential and secure economic self-reliance, parity, power, and civil rights.

24. For the 2020 Census, the Urban League has expended substantial resources developing programs designed to encourage self-response and cooperation with Census Bureau offices in historically undercounted communities. Specifically, the organization has engaged in efforts to educate the public about the census through various methods, including virtual town halls, production and distribution of toolkits, workshops for locally based get-out-the-count organizations, and publication and upkeep of a website, www.MakeBlackCount.org, to disseminate critical information about the census. The Urban League has also worked with Census Bureau regional offices to encourage enumerator recruitment, and the organization uses social media to encourage 2020 Census participation.

25. Plaintiff Black Alliance for Just Immigration ("BAJI") is a nonprofit organization organized and existing under the laws of California, with offices and members across the country, including in Oakland, California, Miami, Florida, Atlanta, Georgia, and New York City.

BAJI collaborates with African Americans and Black immigrants to organize and advocate for equal and just laws in their communities. BAJI campaigns to advance racial justice and provides partner organizations with varied assistance—particularly on immigration policy—and it spends significant resources educating its partner organizations, individuals, and other constituents through presentations, workshops, publications, technical assistance, and trainings. BAJI is a membership organization, and its members either pay dues or volunteer their time to support the organization. Members also actively participate in BAJI's self-governance and decision-making at the local level.

26. For the 2020 Census, BAJI has worked to ensure non-responsive households in Black and immigrant communities are counted. BAJI has hired additional staff dedicated to engaging local communities on the census, and has engaged in outreach using social media and mailers to bolster self-response. In addition, since the outbreak of the COVID-19 pandemic, BAJI staff regularly participate in webinars and virtual events to provide the public more information about the census, with a specific focus on encouraging participation in Black and immigrant communities.

27. The League of Women Voters is a nonprofit civic organization that encourages informed and active participation in government. Founded in 1920, the League of Women Voters is headquartered in Washington, D.C. The League of Women Voters has over 800 state and local affiliates, located in all 50 states and in 764 specific communities, including affiliates with members in San Francisco and Monterey County, California, Detroit, Michigan, Miami, Florida, Philadelphia, Pennsylvania, and New York City. The League of Women Voters seeks to empower voters and defend democracy. The League of Women Voters has over 65,000 members nationwide, and its members either pay dues or volunteer their time to support the organization.

28. The League of Women Voters has engaged in significant efforts to ensure historically undercounted communities are enumerated during the 2020 Non-Response Follow Up operation. Prior to the outbreak of COVID-19 in the United States, the League of Women Voters and its affiliates participated in public events across the country aimed at providing information about the census to undercounted communities. Since March of this year, the League

of Women Voters has shifted to a digital public-education campaign, encouraging education and participation through social media, email listservs, webinars, and blog posts. Affiliates in Kansas, South Carolina and Maine are also participating in state Complete Count Committees that seek to increase awareness of the 2020 Census, improve participation, and coordinate with Census Bureau officials.

29. Harris County, Texas is a political subdivision of the State of Texas. With over 4.7 million residents, Harris County is the third largest county in the United States. The county's population is over 43% Latino, 20% Black, over 7% Asian, and over 28% non-Hispanic White. During the 2010 Census, 65.1% of households in Harris County self-responded to the census. As of August 14, 2020, 58.3% of households in Harris County had self-responded to the 2020 Census. This response rate in Harris County was well below the national response rate on that date, 63.6%.

30. For the 2020 Census, officials in Harris County engaged in extensive efforts to encourage participation in the County. County officials formed a Complete Count Committee with city officials in Houston that engaged in public education about the census, and built partnerships with local Census Bureau officials to coordinate outreach efforts. In addition, in 2019, the County approved a budget of nearly $4 million dollars to conduct outreach during the 2020 Census. To that end, the County has contracted with vendors to conduct surveys about the opinions and attitudes of non-responsive populations and develop a digital advertising campaign on Facebook and Instagram to encourage 2020 Census participation. And the County receives substantial federal funding tied to census data.

31. King County is a political subdivision of the State of Washington. Over 2.2 million people live in King County, making it the most populous county in Washington. As of August 14, 2020, 26.1% of households in King County had not responded to the 2020 Census. The county has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, King County had nearly 12,000 residents experiencing homelessness, the third highest total of any locale in the country. The Seattle metro area, which includes King County, is estimated to have 140,000

undocumented immigrant residents.

32. King County worked in partnership with local cities to provide $1.17 million to community-based organizations serving historically undercounted communities. Specifically, King County sought to fund organizations that work with communities that are Limited English Proficient. Through this funding, these organizations produced public education materials related to the 2020 Census, and developed campaigns to get-out-the-count. And King County, too, receives substantial federal funding tied to census data.

33. The City of Los Angeles, California is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution. The City is home to roughly 4 million people, and is located in the county recognized by the Census Bureau as the hardest to count in the nation. The city's population is a large contributor to the County's hard-to-count status as more than half of the City's residents live in census tracts that are hard to count. As of August 14, 2020, only 53.8% of the City's households had responded to the 2020 Census—well below the statewide average of 65.1% and even further below the City's own 2010 self-response rate of 68 percent.

34. As a result of its hard-to-count status, Los Angeles has engaged in years of planning and devoted significant resources to developing a strategy for an accurate count, tailored to the unique challenges of the City's population. To fund these efforts, the City has overseen distribution of roughly $2 million dollars to community-based organizations and the investment of almost $1.5 million of both City general fund and grant money in its own efforts. And the City of Los Angeles also receives substantial federal funding tied to census data.

35. The City of Salinas, California is a political subdivision of the State of California. Salinas is the most populous city in and the government seat of the County of Monterey. The city is home to more than 150,000 people, including 38.5% of the county's "hard-to-count" population. As of August 14, 2020, 57.2% of all households in Salinas have responded to the 2020 Census, which is 422nd out of all 482 California cities. The current response rate is 7.9 percentage points below California's statewide average for self-responses and more than 10 percentage points below Salinas's self-response rate from the 2010 Census.

36. Salinas has dedicated significant resources to funding and staffing its "Census Action Team," which is composed of city staff and representatives from the County of Monterey's "Complete Count Committee," as well as community-based organizations, school districts, and local businesses. The city's population is more than 75% Latino, and more than 1 in 5 households have limited English-language proficiency. As part of its outreach, the Salinas Census Action Team engages religious and community organizations, such as local food banks, to assist with enumeration efforts in the Latino community and all communities of color as these organizations are able to assist with trust and communication barriers that can make these groups hard to count. The City of Salinas also receives substantial federal funding tied to census data.

37. The City of San Jose is a political subdivision of the State of California. San Jose has over 1 million residents, making it the largest city in Northern California, and the tenth largest city in the United States. San Jose's population is 32% Latino, and 35% Asian, and nearly 40% of residents are foreign born. As of August 14, 2020, 28% of households in San Jose had not responded to the census. San Jose has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, in 2019, San Jose had over 6,000 residents experiencing homeless. In addition, the San Jose metro area is estimated to have over 150,000 undocumented immigrant residents.

38. The City of San Jose has engaged in extensive public-education and get-out-the-count efforts during the 2020 Census. San Jose has formed a Complete Count Committee with Santa Clara County, and nearly 90 community-based organizations. The Committee focuses on raising awareness of the census in historically undercounted communities. San Jose also disseminates information about the census to the public through city departments and offices. San Jose also worked closely with the Census Bureau to recruit qualified bilingual enumerators. The City of San Jose receives substantial federal funding tied to census data.

39. Plaintiff Rodney Ellis is the Commissioner for Precinct One on the Harris County Commissioners Court. He is a resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Ellis regularly drives on roads and highways in Harris County.

40. Plaintiff Adrian Garcia is the Commissioner for Precinct Two on the Harris County Commissioners Court. He is a life-long resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Garcia also regularly drives on roads and highways in Harris County.

II. Defendants

41. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce and the Census Bureau. Congress has delegated the responsibility for carrying out the decennial census to the Secretary of Commerce. 13 U.S.C. § 141(a).

42. Defendant U.S. Department of Commerce is a cabinet agency within the Executive Branch responsible for administering the decennial census.

43. Defendant Steven Dillingham is the Director of the U.S. Census Bureau and is sued in his official capacity.

44. Defendant U.S. Census Bureau is an agency within the Department of Commerce responsible for planning and administering the decennial census. 13 U.S.C. § 2.

FACTUAL ALLEGATIONS

I. Defendants' Constitutional and Statutory Obligations.

45. Under the United States Constitution, the federal government must conduct an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2.

46. The population totals produced by the decennial enumeration are used to apportion congressional representatives to the various states. *Id.* Census figures are also used in state and local redistricting and in the distribution of federal funds to communities across the United States.

47. The Enumeration Clause requires that decisions relating to the census bear a "reasonable relationship" to the constitutional purpose of the enumeration. *Wisconsin*, 517 U.S. at 20.

48. Similarly, the Census Act imposes a mandatory duty on the Secretary of Commerce to "conduct a census that is accurate and that fairly accounts for the crucial

representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

49. Consequently, the Secretary of Commerce and the Census Bureau are constitutionally obligated to make decisions in conducting the census that are reasonably related to achieving a fair and accurate calculation of the population of the United States.

II. The Census Bureau's Pre-COVID-19 Operational Plans for the 2020 Census.

50. For the 2020 Census, the Census Bureau spent the better part of a decade designing operations to fulfill its constitutional and statutory mandate, including: soliciting and incorporating feedback from seasoned experts, advisors, and community groups; testing various features of its data-collection and data-processing operations; and ensuring that its decisions for conducting the census reflected sound, scientifically based judgment.

51. To this end, the Bureau created an operational plan to guide its efforts, including its efforts to collect data from census respondents and to process that data into usable forms for constitutionally and statutorily mandated purposes, including reapportionment and redistricting.

52. On December 31, 2018, the Bureau promulgated the final version of its operational plan, which the Bureau called "Version 4.0" (hereinafter referred to as the "Final Operational Plan"). *See* U.S. Census Bureau, Final Operational Plan (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf. In the Final Operational Plan, the Census Bureau stated that its goal for the 2020 Census is to "count everyone once, only once, and in the right place."

53. Under the Paperwork Reduction Act, the Office of Management and Budget must review and approve the plans for any federal survey, including the decennial census, to ensure that those surveys meet government standards, minimize respondent burden, and maximize the utility of the collected information. 44 U.S.C. § 3504(c).

54. The Office of Management and Budget formally reviewed and approved the Census Bureau's pre-COVID-19 plans for the decennial census, including the Final Operational Plan.

55. The Final Operational Plan includes over 200 pages of detailed and transparent

conclusions for achieving the 2020 Census's objective of an accurate count.

56. The Final Operational Plan reflects the conclusions of various experts including survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

57. The Final Operational Plan states that it "reflects and supports evidence-based decision-making" about the operations necessary to gather and process census responses from every household in the country.

58. The Final Operational Plan states that it was "informed through research, testing, and analysis conducted from 2012 through 2018."

59. The Bureau conducted at least fifteen tests between 2012 and December 31, 2018, when it published its Final Operational Plan.

60. Career Bureau staff developed the Final Operational Plan following substantial consultation with outside experts and census stakeholders, including members of the Census Scientific Advisory Committee and the National Advisory Committee.

61. The Census Bureau also produced a series of "detailed operational plans," which supplement the Final Operational Plan, and provide more parameters for the individual operations that, together, comprise the 2020 Census.

62. The detailed operational plans likewise reflect the conclusions of various subject-matter experts regarding how to complete an accurate count.

63. The Bureau's Final Operational Plan contains several major categories of operations. Two of those categories are particularly important for purposes of this lawsuit: data-collection and data-processing.

64. "Data-collection" refers to operations through which the Bureau obtains information from and about all the people living in the United States.

65. "Data-processing" refers to operations through which the Bureau fills in any gaps in the personal information that it collects from people, transforms the resulting data into usable forms, checks those results for accuracy and other aspects of data quality, and publishes those results, among other things.

66. The Bureau must thoroughly, fully, and correctly perform both categories of

operations—collection and processing—to achieve its stated goal of counting everyone once, only once, and in the right place.

A. Census Data Collection

67. During the census, the Bureau attempts both to determine the number of people in the country and their characteristics, such as their race and ethnicity.

68. Although the Census Bureau planned to deploy many methods during the 2020 Census to collect counts and characteristics from households around the country, the Bureau contemplated, in both the Final Operational Plan, and in the supplemental detailed operational plans, that three methods would account for the overwhelming majority of census responses: the "Self-Response" method; the "Update Leave" method; and the "Non-Response Follow Up" method. *See* U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Non-Response Follow Up Operation* (July 15, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf.

69. The Self-Response method was the "primary methodology for the 2020 Census." Under this method, heads of households would provide their 2020 Census responses directly to the Census Bureau by mailing back a paper census form, filling out a digital form on the Bureau's online census portal, or calling into telephone hotlines to provide their responses to Bureau employees operating those hotlines.

70. The Update Leave method was the methodology for reaching housing units that could not receive physical mail or did not have verifiable mailing addresses. Under this method, Bureau employees would travel throughout both rural and urban areas, leaving invitations to participate and paper census questionnaires at these housing units, so that the people living in those locations could respond themselves.

71. The Self-Response method and the Update Leave method are crucial for obtaining accurate information about the number of people in the country and their characteristics, because data people report about themselves and the members of their housing units is the highest quality data that the census collects.

72. But for the tens of millions of households that do not report their personal data through the Self-Response or Update Leave method, the Bureau's next-best source of personal data is data it collects directly from people through the Non-Response Follow Up method.

73. As part of the Non-Response Follow Up method, the Bureau sends its employee enumerators directly to housing units so that they can attempt to speak with a person occupying each unit and obtain information about everyone who should be counted in that unit.

74. The Bureau requires enumerators to record their responses for each household through iPhones that the Bureau specifically contracted and customized for this purpose. The enumerators' iPhones include software designed to lead enumerators consistently and reliably to solicit information from people at their doors. The enumerators' iPhones also include software to ensure that any data collected from housing units remains confidential as it is being transmitted to the Bureau. The limited supply of these customized iPhones places a limit on the number of enumerators that the Bureau can deploy in the field.

75. The Bureau's Detailed Operational Plan for Non-Response Follow Up, which supplements the Final Operational Plan, sets out a specific protocol for conducting Non-Response Follow Up.

76. Under the Detailed Operational Plan, each housing unit assigned for a visit from an enumerator was eligible for up to six "contact days." A "contact day" could include more than one attempted contact per day.

77. The Bureau concluded it could pursue less than six contact days only under certain scenarios.

78. One scenario that would allow the Bureau to pursue fewer than six contact days was the existence of high-quality administrative records for the housing unit. The Census Bureau has collected data from federal administrative agencies, such as the Social Security Administration, the Internal Revenue Service, and the Department of Housing and Urban Renewal, among others, as well as data from states, which it uses to provide information about the count and characteristics of non-responsive households.

79. If the Bureau had located administrative data from federal and/or state

administrative records and concluded that those records contained accurate demographic data for the occupants of a housing unit, the Bureau's enumerators would attempt only one contact with that unit. If—during that contact attempt—the enumerator did not succeed in finding a live person at the unit, then the Bureau would use the information in the administrative records to fill in the census responses for that unit during the data-processing phase of the 2020 Census.

80. A second scenario that would allow the Bureau to pursue less than six contact days would arise if the Bureau identified a proxy—a person such as a neighbor or landlord that the enumerator could ask for information about the occupants of the housing unit in question. After a third failed contact attempt, a unit would become eligible for being counted through proxy.

81. Proxies can produce many types of data. For instance, proxies are useful for helping the Bureau identify whether a housing unit is vacant—and thus should be marked "vacant" in the Master Address File that the Bureau uses to keep track of the overwhelming majority of housing units that it must enumerate—or non-existent—and thus should be deleted from the Master Address File. For the 2020 Census, the Bureau is planning to use administrative records, such as the United States Postal Service's directory of non-deliverable addresses, to identify vacant housing, but proxies are generally more accurate for this purpose. Finally, proxies provide vital data for other operations that the Bureau undertakes during its data-processing phase, described further below.

82. If the Bureau is unable to enumerate a household after six contact days, in most cases, it will resort to less accurate methods for determining the count and characteristics of the household during its data-processing phase, described below.

83. The Bureau performs several other vital operations in addition to door-knocking during the Non-Response Follow Up period, including a series of operations to ensure the quality of the data that it collects in the field.

84. During the Non-Response Follow Up process, the Bureau: follows up with people who self-responded to the census online but did not enter their unique census identification number to ensure that they are counted in the right place (a process known as "Field

Verification"); and corrects information reported erroneously or omitted from previously submitted census forms (a process known as "Coverage Improvement").

85. In addition, the Bureau re-collects census responses in select instances to ensure that the original submissions were accurate (a process known as "Self-Response Quality Assurance"). This operation protects against enumerators falsifying the information that they provide to the Bureau. Specifically, the Bureau conducts quality control reinterviews of a sample of households. This component is designed to deter and detect cases where enumerators have provided false information about the housing units they are assigned to canvass.

86. Quality control reinterviews are part of a broader set of protocols that the Bureau has developed to guard against factors that endanger the accuracy of the count. Non-Response Follow Up is thus important not only for collecting information, but also for ensuring that the information that is collected is accurate. These two components—gathering data and ensuring its accuracy—must both occur for the Bureau to get a fair and accurate count.

87. The Bureau anticipated that approximately 60% of housing units nationally would respond to the 2020 Census through Self-Response and Update Leave, potentially making up to 40% of housing units targets for Non-Response Follow Up.

88. A Non-Response Follow Up universe of 40% of the housing units in the country would have been the largest follow up universe on a percentage basis since at least 1970.

89. The Census Bureau did not anticipate that the Non-Response Follow Up universe in 2020 would mirror the demographic makeup of the nation's population as a whole.

90. Instead, the Census Bureau anticipated that the Non-Response Follow Up universe in 2020 would contain a disproportionate number of people who belong to communities that the Bureau calls "hard-to-count."

91. The Final Operational Plan describes hard-to-count populations as including, but not limited to, the following populations: young children; highly mobile persons; racial and ethnic minorities; non-English speakers; low-income persons; persons experiencing homelessness; undocumented immigrants; persons who have distrust in the government; lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) persons; persons with mental and

physical disabilities; and persons who do not live in traditional housing.

92. Historically, these populations have had low self-response rates and have, thus, made up disproportionate shares of households that must receive contact days during Non-Response Follow Up.

93. Consequently, the Final Operational Plan acknowledges, "[t]he NRFU Operation is entirely about hard-to-count populations."

94. The Final Operational Plan also acknowledges that hard-to-count populations may require more outreach than the Non-Response Follow Up method would normally provide, and the Bureau designed its Final Operational Plan accordingly.

95. The Final Operational Plan states that "[w]hile most cases receive a maximum of six attempts, cases in hard-to-count areas may receive more than six attempts to achieve a consistent response rate for all geographic areas."

96. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

B. Census Data-Processing

97. After collection activities are complete, the Census Bureau must process the data.

98. Census data-processing cannot begin until census data-collection concludes.

99. Census data is unusable for its intended purposes until it has been processed.

100. The Census Bureau's data-processing operations transform tens of millions of census responses into usable products, including the population totals used to reapportion seats in the U.S. House of Representatives and to create electoral districts.

101. The Bureau uses its data-processing operations to, among other things, ensure that data received from different data-collection methods are all in a single format allowing them to be processed together.

102. The Bureau uses its data-processing operations to "unduplicate responses"—

meaning to resolve conflicts of information among multiple forms attributable to the same housing unit.

103. The Bureau uses its data-processing operations to determine the final status of a housing unit—such as vacant or inhabited—and determine the total number of people that should be attributed to any apparently inhabited unit that was not counted through Self-Response, Update Leave, or Non-Response Follow Up.

104. The Bureau also uses its data-processing operations to ensure that Bureau data products accurately report respondents' characteristics, such as age, race, and ethnicity.

105. The Bureau uses administrative records and statistical imputation during the data-processing phase to fill in both missing people and their characteristics. But administrative records—especially low-quality administrative records—and statistical imputation are generally less accurate than self-response data.

106. For many households, administrative data provides only low quality information, replete with inaccuracies and incomplete information. This is especially the case for particular communities that are underrepresented in administrative records, including communities of color, immigrants, and low-income families. Use of this low-quality data to fill in missing information for non-responsive households produces less accurate information.

107. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household. Imputation thus assumes the existence of other data points gathered through other data-collection methods—such as self-response, proxies, and administrative records—and generates more accurate results when it can be triangulated against those data points. The processes that the Bureau uses to collect and process self-response data, proxy data, and administrative records are thus critical and inextricably linked to the Bureau's ability to impute data accurately.

108. At various phases of the Bureau's data-processing operations, Census Bureau personnel must review the quality of files in-process before those files can be sent to the subsequent steps in the data-processing operation. These reviews include personnel with subject-matter expertise from several different divisions of the Bureau.

109. The Bureau's data-processing operations help ensure that people are not missed, that other people are not counted multiple times, and that people's characteristics are accurately reported. These processes help eliminate or reduce undercounts, among other kinds of data-quality issues.

C. The Final Operational Plan's Original Timeline for the 2020 Census

110. The Bureau's Final Operational Plan called for data-collection to run from January 21, 2020, to July 31, 2020, for a total of more than six months.

111. In that window, the Self Response method was scheduled to run from March 12, 2020 to July 31, 2020, and the Update Leave method was scheduled for March 15, 2020 to April 17, 2020.

112. The Bureau also scheduled several special operations to occur early in its census taking process. The Service-Based Enumeration, which counts people experiencing homelessness, was scheduled for March 30, 2020 to April 1, 2020, and Group Quarters Enumeration, which counts people living in group housing such as nursing homes, was scheduled from April 2, 2020 to June 5, 2020.

113. The Bureau scheduled the Non-Response Follow Up method to run from May 13, 2020 to July 31, 2020, for a total of approximately eleven and a half weeks.

114. The Bureau scheduled up to five months—from July 31, 2020 to December 31, 2020—to process census data for the congressional reapportionment report.

115. The Bureau also scheduled an additional three months—from January 1, 2021 to March 30, 2021—to process census data for redistricting.

116. The Bureau's timelines for implementing the Final Operational Plan reflect the Bureau's scientifically informed understanding of the time necessary to complete its operations and generate an accurate count.

III. The Census Bureau's COVID-19 Plan.

A. COVID-19 Disrupts the 2020 Census

117. On January 21, 2020, the Bureau began 2020 Census data-collection in remote Alaska.

118. On March 10, 2020, the Bureau began to accept self-responses on its website.

119. Shortly thereafter, many parts of the nation rapidly began to shut down due to the COVID-19 pandemic.

120. The Census Bureau quickly concluded that it could not continue to engage in operations safely. On March 18, 2020, the Bureau announced that it would suspend all field operations for two weeks in order to "help protect the health and safety of the American public." Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

121. On March 28, 2020, the Bureau announced yet another two-week suspension until April 15, 2020, as the coronavirus pandemic made it impossible to engage in operations.

122. The suspension disrupted several field operations, including Update/Leave method, the Service Based Enumeration counting people experiencing homelessness, and the Group Quarters Enumeration counting people living in group housing.

123. In addition, the Bureau halted all hiring and training of the hundreds of thousands of enumerators it needs to conduct Non-Response Follow Up. This included halting any and all background checks and fingerprinting of enumerators that were conditionally hired at that time.

124. The Bureau also decreased office staff at regional centers responsible for processing mail-in self-response forms and at the Bureau's call centers.

B. Changes to the Final Operational Plan in the COVID-19 Plan

125. On April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the long-term impact of the COVID-19 pandemic. The new plan included a shifted timeline for data-collection and data-processing operations that corresponded with the delays in operations that the pandemic has caused (the "COVID-19 Plan").

126. Adjustments to plans approved by the Office of Management and Budget under the Paperwork Reduction Act must be re-submitted for approval. 44 U.S.C. § 3507(h)(3). The Census Bureau submitted the COVID-19 Plan to the Office of Management and Budget on April 30, 2020. The changes were approved on May 11, 2020.

127. The COVID-19 Plan was designed to "[e]nsure a complete and accurate count of all communities," "[p]rotect the health and safety of the American public and Census Bureau employees," and "[i]mplement guidance from federal, state, and local authorities regarding COVID-19." Press Release, U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19 Fact Sheet* (Apr. 27, 2020).

128. The COVID-19 Plan reflected the conclusions of various experts for how best to proceed with completing an accurate count during the current pandemic. These experts include survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

129. Under the COVID-19 Plan, the Bureau suspended 2020 Census field operations for several months, including those operations that were designed to ensure a full count of traditionally undercounted communities.

130. The COVID-19 Plan provided that the Bureau would start the nationwide Non-Response Follow Up operation on August 11, 2020, and continue the door-knocking process through October 31, 2020.

131. Thus, the COVID-19 Plan delayed the start of most door-knocking by three months while maintaining the same amount of time spent undertaking the process—approximately eleven and a half weeks—as the Final Operational Plan had required.

132. Under the COVID-19 Plan, the Bureau also delayed the start of other operations that enumerate traditionally undercounted populations, including the enumeration of the country's homeless population, which the Bureau shifted from March 30, 2020 to September 22, 2020.

133. And the COVID-19 Plan permitted households to submit self-response data to the Bureau until October 31, 2020, extending the deadline under which private persons were able to submit their responses to be counted by more than one month.

134. The Bureau also granted itself one additional month to process data under its COVID-19 Plan, extending the data-processing leg of its operations to nine months given the pandemic. Under this plan, the Bureau would have up to six months to process the data for the apportionment count (between October 31, 2020 and April 30, 2021) and three months to process

the data for redistricting (between April 30, 2021 and July 31, 2021).

135. The Bureau's timelines for implementing the COVID-19 Plan reflect a scientifically informed understanding of the time necessary to appropriately and fully complete its operations and generate an accurate count.

C. Expert and Stakeholder Response to the COVID-19 Plan

136. The Census Bureau solicited feedback on the COVID-19 Plan from relevant area experts and interested stakeholders, including state and local governments and national and community-based non-profit partners.

137. For instance, four former Census Bureau Directors—who served under both Democratic and Republican administrations—issued a statement saying that they had "discussed these operational and schedule adjustments with senior career leadership at the Census Bureau." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

138. These four former Census Bureau Directors further asserted: "Based on (1) our extensive experience in planning, executing, and often adjusting operations of previous decennial censuses, and (2) our firm conclusion that the extension of the field operations reflect careful analysis by the technical, scientific, and operational staff at the Census Bureau, we support the decision and urge Congress to act in concert with it." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

139. Prominent civil-rights groups endorsed the COVID-19 Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that her organization "support[ed] the Census Bureau's updated timeline." Press Release, Leadership Conference Education Fund, *Census Timeline Must Protect Health, Ensure Fair Count* (Apr. 13, 2020), https://civilrights.org/edfund/2020/04/13/census-timeline-must-protect-health-ensure-fair-count/.

D. Implementation of the COVID-19 Plan

140. When announcing the COVID-19 Plan, Secretary Ross and Director Dillingham issued a statement indicating that the Bureau requested that Congress extend by 120 days the December 31, 2020 statutory deadline for reporting the state-population totals to the President for purposes of calculating the state apportionments, and extend by 120 days the March 30, 2021 statutory deadline for delivering redistricting data to the states.

141. That same day, President Trump suggested this request was unnecessary, stating:

142. "I don't know that you even have to ask them. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

143. Indeed, the Census Bureau did not wait for Congress to act before beginning implementation of the COVID-19 Plan. And the Bureau continued implementation of the COVID-19 Plan for over three months through the end of July 2020.

144. For instance, the Census Bureau field operations remained suspended through May 2020.

145. The Bureau only began re-opening a few limited operations, such as the Update Leave method, on a phased basis through mid-June 2020, over two months after the operation was originally planned to occur in the Final Operational Plan.

146. The Bureau did not undertake any Non-Response Follow Up operations in most of the country between May 13, 2020 and July 31, 2020, the timeframe originally set out in the Final Operational Plan.

147. Instead, while the Bureau "soft-launched" door-knocking in select regions of the country in mid-July 2020, the COVID-19 Plan did not call for door-knocking across the country until August 11, 2020, at the earliest.

148. The Bureau ultimately opened six area census offices for Non-Response Follow Up on July 16, 2020, six more on July 23, 2020, thirty-five on July 30, 2020, and forty additional

offices on August 6, 2020.

149. The remaining 161 stateside offices remained unopened until August 9, 2020, including offices in many states and localities with relatively low response rates such as the entire southeastern United States, Texas, New Mexico, Arizona, and Southern California.

150. All along the Bureau continually communicated to the public, and to important local partners, including local governments and national and community based non-profit organizations, that self-responses would be accepted until October 31, 2020, and that Non-Response Follow Up would continue until at least that date.

151. Census partners, stakeholders, and state and local governments relied on the new deadlines set forth in the COVID-19 Plan to redirect their outreach efforts.

152. For example, Plaintiffs Urban League and BAJI, publicized the October 31, 2020 deadline, letting their constituents, members and local organizations know that households had until that time to self-respond. Urban League representatives informed coalition partners participating in the Black Census Roundtable of the new deadlines, and spoke of the deadlines on webinars and other public events. Officials at BAJI publicized the deadlines at public events, including webinars in July 2020, and as part of the organization's social media campaign.

153. Similarly, officials in City of Los Angeles, Harris County, King County, City of San Jose, and City of Salinas, publicized the new deadline while conducting 2020 Census outreach efforts.

154. These public education efforts were significant because they were directed at the general public and at local non-profits that do not primarily work on census issues. The latter often rely on information about the census provided by Plaintiff national non-profits and local governments when communicating with their constituents. Plaintiffs, by disseminating the October 31, 2020 deadline for nearly three months to the public, were largely successful in spreading the understanding that communities had until at least that time to complete the count.

155. For example, the City of Los Angeles announced this date on its own social media platforms and in a social media toolkit that it developed for partner organizations. Los Angeles is deeply concerned that residents have already received information about the October 31, 2020

self-response date and, as a result, will fail to respond before the newly shortened deadline, especially given the Bureau's own minimal efforts at explanation and outreach around the new deadline.

156. Finally, the level of self-response during the 2020 Census, and the ongoing COVID-19 pandemic, provided further evidence for the necessity of continued implementation of the COVID-19 Plan.

157. Under its Final Operational Plan, for example, the Census Bureau had planned to spend eleven and a half weeks canvassing a Non-Response Follow Up universe comprised of 39.5% of households nationally.

158. As of August 9, 2020, the first date of nationwide Non-Response Follow Up, the national self-response rate was 63.2%, meaning that nearly 37% of households nationwide had not yet responded to the census.

159. Several cities with large percentages of traditionally undercounted populations, have even lower response rates. For instance, as of August 14, 2020, the response rate in the City of Detroit was 48.9%, Miami was 49.9%, Philadelphia was 52.3%, Los Angeles was 53.8%, Houston was 54.4%, and New York City was 55.6%.

160. The United States had 24,156 new coronavirus cases on April 13, 2020, the day the Bureau announced its COVID-19 Plan. On August 3, 2020, the United States had approximately 50,000 new coronavirus cases.

161. With COVID-19 limiting the willingness of people to apply for enumerator positions, the areas where the Bureau can safely send enumerators to knock on doors, and the willingness of the public to interact with enumerators, the Non-Response Follow Up operation continues to face far more complications than the Final Operational Plan anticipated.

162. Given these conditions of low response rates and increased coronavirus spread, the Bureau can reasonably expect that it will need to engage in a Non-Response Follow Up operation at least as comprehensive and time-consuming as the operation laid out in the Final Operational Plan.

163. Due to significant delays in operations resulting from the implementation of the

COVID-19 Plan, the Bureau itself has recognized that it would be impossible to produce fair and accurate apportionment numbers to the President by December 31, 2020.

164. On May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of American Indians that, "[w]e have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689.

165. On July 8, 2020, Al Fontenot, Jr., Associate Director for Decennial Census Programs and a top Census Bureau official, affirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

IV. The Census Bureau's New Rush Plan.

A. The Announcement of the Rush Plan

166. On August 3, 2020, at the behest of the Secretary of Commerce, Director Dillingham abruptly and without explanation abandoned the COVID-19 Plan and announced the Rush Plan.

167. The Rush Plan drastically shortens the timelines for multiple operations set out in the COVID-19 Plan.

168. The Rush Plan took the form of a short press release on the Census Bureau's website. The press release included a statement from Director Dillingham, which did not provide an explanation for Defendants' decision to suddenly abandon the COVID-19 Plan that the Bureau had adopted and implemented for approximately three and a half months. Nor did it provide any specifics as to why the Bureau no longer believed the timelines called for in the COVID-19 Plan were necessary to ensure an accurate count.

169. The statement noted that the Bureau was taking this action at the direction of the

Secretary of Commerce. But the Secretary made no statement explaining his reason for giving this directive.

170. The Director's statement was largely silent on specific adjustments the Bureau would need to make in order to reengineer its field operations to meet its new, artificially compressed schedule. The statement included proposals for enumerator "awards" and maximizing enumerators' phone and tablet usage, but it did not provide any details about adjustments to the detailed operations provided in the Final Operational Plan.

171. The only adjustments announced under the Rush Plan were severely truncated timelines for conducting data-collection and data-processing operations.

172. Under the Rush Plan, data-collection is now set to end on September 30, 2020, one month earlier than contemplated in the Bureau's COVID-19 Plan.

173. While the Bureau's pre-COVID-19 Final Operational Plan provided 79 days for the nationwide door-knocking stage of the census, and the COVID-19 Plan provided 81 days, the Rush Plan provides just 52 days of nationwide door-knocking.

174. The Rush Plan also cuts post-collection data processing for the apportionment report from up to 6 months as provided in the COVID-19 Plan, and up to 5 months as originally provided in the Final Operational Plan, to less than 3 months.

175. The Rush Plan also shortened the time under which households can self-respond, providing that self-responses delivered after September 30, 2020—which previously would have been timely under the October 31, 2020 deadline—will no longer be counted.

176. While the Rush Plan requires the Bureau to accelerate its operations to complete the 2020 Census by the same deadline contemplated in the Final Operational Plan, it ignores the multiple-month pause in operations, beginning in mid-March 2020, caused by the initial outbreak of COVID-19 in the United States.

177. The decision to rescind the COVID-19 Plan and adopt the Rush Plan was announced without consultation with important stakeholders.

178. As noted above, as late as July 8, 2020, senior Bureau officials were still confirming that it was impossible to complete an accurate count by December 31, 2020.

179. In addition, until July 30, 2020, just four days before the Bureau announced its decision to abandon the COVID-19 Plan, the Bureau was informing respondents on its website that it would engage in Non-Response Follow-Up until October 31, 2020 and that non-responsive households would have until that date to self-respond. Those references were deleted from the website on or about July 31, 2020 and were replaced with the shortened timeframe after the August 3, 2020 announcement.

180. An official at the Government Accountability Office confirmed that Bureau officials told his office that they were given "hours rather than days or weeks" to adjust their plans to finish counting by September 2020. Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

181. While the Census Bureau's decisions, even during the COVID-19 emergency, have often involved consultations with scientific advisory committees, the Committee on National Statistics in the National Academies of Science, other external experts and local government officials, and the thousands of organizations partnering with the Bureau to conduct crucial outreach to historically undercounted communities, no such consultation was made before the Bureau announced its abandonment of the COVID-19 Plan.

182. Census stakeholders immediately denounced the Rush Plan, including stakeholders who had endorsed the COVID-19 Plan.

183. The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a statement saying that "our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

184. These four former Census Bureau Directors further asserted: "The Census Bureau

will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale tha[n] in previous census. The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

185. The President of the American Statistical Association, the world's largest professional organization of statisticians, issued a statement saying "[t]here is no scientific rationale to curtail the data-collection period for this constitutionally mandated activity, and the premature cessation of census enumeration will produce flawed counts." Letter from Rob Santos, President of the American Statistical Association, to Mitch McConnell, U.S. Senate Majority Leader (Apr. 5, 2020), https://www.amstat.org/asa/files/pdfs/POL-CensusSenateAugust.pdf.

186. Nearly 450 nonpartisan philanthropic organizations who "rely on accurate census data to help identify community needs and to prioritize grantmaking" issued a letter to Secretary Ross and Director Dillingham urging the Bureau to revert to its COVID-19 Plan. Letter from U.S. Philanthropy Leaders to Wilbur Ross, Secretary of the U.S. Dep't of Commerce (Aug. 5, 2020), https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf.

187. Prominent civil-rights groups condemned the Rush Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that "[c]urtailing operations is an obvious ploy to guarantee the Census Bureau won't be able to finish counting millions of people—especially those hit hardest by the pandemic." Press Release, Leadership Conference on Civil and Human Rights, *Trump Plans to Sabotage 2020 Census by Cutting Short Operations* (July 31, 2020),

https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/.

188. And the Census Bureau's own field workers have confirmed the impossibility of this new timeline, explaining that the Rush Plan means that it will not be an accurate count for the next 10 years.

B. The Rush Plan Fails to Appropriately Account for Key Factors Affecting the 2020 Census

189. The Rush Plan fails to account for several important factors that affect the 2020 Census Non-Response Follow Up operation.

190. *First*, the Rush Plan does not adequately account for the large number of households in the Non-Response Follow Up universe.

191. Under the Rush Plan, the Census Bureau must attempt to count approximately the same number of households during Non-Response Follow Up as it anticipated counting in its pre-COVID-19 Final Operational Plan, but the Bureau will have four weeks less than provided in that plan to complete the operation. In other words, the Bureau must now try to complete the same amount of work in just 65% of the time it had originally scheduled to complete that work.

192. Over 37% of households nationwide are non-responsive, and several states have even higher percentages of households in the Non-Response Follow Up universe, including New Mexico (46.1%), South Carolina (42.4%), Texas (41.3%), and Georgia (40.8%).

193. While soft-launches of Non-Response Follow Up began in select locations in mid-July 2020, the operation did not begin in any of these states, with large amounts of non-responsive households, until August 9, 2020.

194. Within states, and in particular cities and localities, there are even higher Non-Response Follow Up workloads. For instance, in Plaintiff Harris County, enumerators must still visit over 41% of households. In the City of Los Angeles, over 46% of households remain to be enumerated. The self-response rate in Los Angeles is approximately 14 percentage points below the final self-response rate the City attained during the 2010 Census. Counting in these jurisdictions also did not begin until August 9, 2020.

195. Moreover, given the time constraints placed by the Rush Plan, counting will need to be conducted while these jurisdictions, in many places, struggle to control a surge in COVID-19 cases.

196. While the Bureau announced on August 11, 2020 that it is now "training census takers to follow up with households by phone" in light of the pandemic, that change in Non-Response Follow Up operations was not anticipated in the Final Operational Plan. Press Release, U.S. Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020), https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html.

197. Given the traditionally low response rates for phone surveys in the wireless era, following up by phone is unlikely to materially increase response rates.

198. A recent Census Bureau survey running in parallel with the 2020 Census demonstrates the difficulty in obtaining responses via phone or email. This spring, the Bureau began conducting a "Household Pulse Survey" to measure household experiences under the COVID-19 pandemic. This survey solicited participation through emails and text messages. Over the first twelve weeks of this survey, response rates were meager, ranging from 1.3% to 3.8%.

199. *Second*, the Rush Plan does not account for the staffing challenges that the Bureau is currently experiencing, many of which are directly related to the ongoing pandemic.

200. As demonstrated in the soft-launch of Non-Response Follow Up in select locales, the Bureau is already experiencing staffing shortages and retention problems with enumerators.

201. In the midst of the ongoing pandemic, prospective enumerators, many of whom are elderly and at high risk of contracting a severe COVID-19 related illness, are less willing to engage in the required door-to-door canvassing.

202. Indeed, Tim Olson, head of field operations for the 2020 Census, stated at a July 8, 2020 press briefing that "[a]bout a third of our [enumerator] applicants [are] older persons considered high risk of the virus." U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

203. And Deborah Stempowski, the Census Bureau's Assistant Director for Decennial Programs, noted the Bureau's difficulty retaining enumerators in early August 2020, confirming that potential enumerators were "a little hesitant because of the COVID environment." Mike Schneider, *Census Bureau Drop-Outs Complicate Door-Knocking Efforts*, Associated Press (Aug. 8, 2020), https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts.

204. In testimony before Congress on July 28, 2020, Director Dillingham confirmed that the Bureau believed that "the pandemic is estimated to increase the number of no shows to training sessions, as well as the number of employees who complete training but decline to show up for work." *Id.*

205. According to reports from census-operations staff working in the field, these predictions have come to pass. One census field supervisor working in the mid-Atlantic noted that, given the new rushed timeline and lack of sufficient staff, "[w]e're just sending bodies out regardless of whether they're ready or not." Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

206. In addition to enumerator low-count and hesitancy, another source of staffing issues involves delays in processing background checks on enumerator applicants and in enumerator onboarding.

207. A June 2020 GAO report on the 2020 Census delays COVID-19 has caused, and the risks the pandemic has exacerbated, noted that the Bureau "will have to quickly hire and onboard sufficient staff to conduct its operations" to reach adequate staffing levels. U.S. Gov't Accountability Office, *COVID-19 Presents Delays and Risks to Census Count* (June 2020), https://www.gao.gov/assets/710/707456.pdf.

208. That same report also noted that, once potential enumerators accept a job offer from the Bureau, the new hires "must wait a minimum of 60 days before they can begin training, a time period during which they must complete fingerprinting and a background check." *Id.*

209. Reports from recently hired enumerators confirm that the Bureau is facing these

technical challenges as well, under the compressed timeline. One recent hire in Boulder, Colorado noted that he lost six potential days of door-knocking because he was unable to complete the Bureau's online training module.

210. Thus, under the Rush Plan, the Bureau will not be able to hire and train sufficient enumerators.

211. Even if it were possible for the Bureau to hire all of the enumerators it will need, the Bureau would also need time and funding to obtain additional equipment for any additional enumerators it hires beyond its initial estimates of equipment. For example, the Bureau would need more of the iPhones discussed above that the Bureau specifically contracted and customized for 2020 Census enumerators.

212. With fewer enumerators in the field, in addition to training and equipment issues, the Bureau cannot ensure that non-responsive households receive the requisite number of visits, as contemplated in the Final Operational Plan.

213. While the Bureau had a $2 billion contingency fund prior to the existence of the COVID-19 pandemic, it has already used $1.5 billion of that fund addressing pandemic-related issues. The remaining $500 million will be needed to further respond to the pandemic, and, in any event, is nowhere near the $1 billion that the administration claims that the Bureau would need to conduct adequate Non-Response Follow Up operations under the Rush Plan.

214. Thus, instead of providing additional enumerators, the Bureau's Rush Plan will likely result in a smaller number of enumerators shouldering larger-than-planned workloads. Increasing workloads for enumerators over a short period of time can result in errors and inaccuracies in counting but it cannot make up for the time lost to the Rush Plan.

215. *Third*, the Rush Plan fails to account for factors relevant to efficient enumeration, such as the time when enumerators visit households.

216. For instance, under the Final Operational Plan, enumerators visit households at specific times of day and on specific days of the week, depending on when residents are likely to answer.

217. Under the Rush Plan, enumerators will be under pressure to complete their work

in a tightly constrained timeframe. As a result, ensuring that non-responsive households receive the requisite number of enumerator visits at the most opportune times for enumeration may become exceedingly difficult, if not impossible. Instead, the Rush Plan increases the likelihood that households will either receive visits at less opportune times, or simply receive fewer visits altogether.

218. *Fourth*, the Rush Plan fails to account for the additional crucial operations that enumerators must conduct, as contemplated in the Bureau's final plans for the 2020 Census. Apart from visiting households upwards of six times, enumerators also engage in a host of additional quality control activities.

219. As noted above, enumerators are expected to visit the households of persons that self-responded to the census online but did not enter the unique identifier provided on census mailers. This "non-ID processing" is necessary to verify the address information provided by respondents. While this process only requires a single visit to a household, it nevertheless must be completed in the compressed timeline provided for under the Rush Plan.

220. Similarly, the Bureau must conduct quality control reinterviews of a sample of households during Non-Response Follow Up. This operation is designed to deter and detect enumerator falsification. Detecting such falsifications will be especially important under the Rush Plan where individual enumerators must shoulder a heavier workload. The use of enumerators to conduct these reinterviews will, under the Rush Plan, place additional strain on the Bureau's already stretched labor resources.

221. Cutting any one of these functions will cause errors and inaccuracies to affect the final 2020 Census data. By reversing the COVID-19 Plan and shortening the timeframe for conducting Non-Response Follow Up by a month, the Bureau will likely need to make cuts to one or more of these operations.

222. By reducing the amount of time and resources necessary to perform the kinds of quality-control measures that the Bureau originally planned for Non-Response Follow Up, the Rush Plan actively dismantles processes that the Bureau has specifically developed over the course of time as checks against falsified census responses. The Rush Plan thus threatens census

accuracy not only by reducing the Bureau's time to *collect* data, but also by reducing the Bureau's time to ensure that the data it has collected has been collected *properly* and *truthfully*.

223. *Fifth*, the Rush Plan fails to account for the other field operations enumerators will need to conduct at the same time as they attempt to speed through door-knocking operations.

224. Under the Final Operational Plan, the Bureau planned to finish specialized operations for counting people experiencing homelessness, and people living in group housing in April 2020, before engaging in nationwide door-knocking. After suspending operations due to COVID-19, the Bureau moved these operations to September 2020, well-before the October 31, 2020 deadline the Bureau set for completing the Non-Response Follow Up operation.

225. The new Rush Plan requires the Bureau to conduct these specialized operations at the same time as it is scrambling to complete Non-Response Follow Up. This will further stretch the Bureau's limited resources and increase the likelihood of missing information.

C. The Rush Plan Also Fails to Appropriately Account for Factors that Will Affect Post-Collection Data Processing

226. The Rush Plan fails to account for the additional strain on data-processing operations resulting from the consequences of the COVID-19 pandemic.

227. Following the outbreak of COVID-19 in the United States in mid-March 2020, colleges and universities across the country closed, and students moved out of campus and off-campus housing. Similarly, many residents of cities, especially those living in COVID-19 hotspots, moved to locations where the virus was less prevalent. In a recent study, three percent of people surveyed reported that they had moved permanently or temporarily as a result of the pandemic.

228. This significant movement of people coincided with Census Day, April 1, 2020, and will lead to confusion about what residence should be listed on responses.

229. It is likely that the Bureau will receive an increased amount of duplicate responses, which will, in turn, require more time and Bureau resources to review and correct.

230. The Rush Plan also fails to account for the Bureau's inability to timely obtain and process all the administrative-records data crucial for completing an accurate count.

231. The Bureau relies principally on Title 26 data—that is, tax returns that individuals file with the Internal Revenue Service ("IRS")—for the administrative records it uses to fill in missing people and their characteristics.

232. Because this year's tax filing deadline was July 15, 2020, and the IRS generally requires three months to transfer Title 26 data to the Census Bureau, the Bureau will not possess all the Title 26 data it is planning to use until mid-October 2020, at the earliest. Once the Bureau has possession of that Title 26 data, it will have to undertake a time-consuming round of additional review and processing, further delaying its ability to use the data for its planned purposes. These delays will compel the data-processing phase of 2020 Census operations to proceed more slowly than the Rush Plan contemplates or would allow.

233. Ultimately, the solution to alleviate each of these problems was articulated in the COVID-19 Plan: provide the Bureau's limited number of enumerators with additional time to conduct the data-collection operations necessary to ensure a complete and accurate census, and provide Bureau staff with additional time to conduct the data-processing operations necessary to ensuring the same. The Rush Plan fails to address these issues or explain why the Bureau's prior conclusions were incorrect..

D. The Rush Plan Does Not Account for Federal Statistical Guidelines

234. In replacing the COVID-19 Plan with the Rush Plan, Defendants departed from federal government statistical standards that promote the accuracy of information collected and disseminated by the agencies.

235. The Bureau's failure to follow these standards further emphasizes its inability to conduct an adequate count in the time and under the conditions that the Rush Plan provides.

236. Under the Paperwork Reduction Act, the Office of Management and Budget is responsible for coordinating the federal statistical system, including the development and implementation of "Governmentwide policies, principles, standards, and guidelines" "concerning [] statistical collection procedures and methods." 44 U.S.C. § 3504(e)(3) (A).

237. The Office of Management and Budget is responsible for issuing guidelines that provide "procedural guidance to Federal agencies for ensuring and maximizing the quality,

objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." Consolidated Appropriations Act, FY 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

238. One such guideline issued by the Office of Management and Budget provides specific standards to agencies like the Census Bureau, in ensuring the quality and utility of federal statistical surveys, such as the decennial census. Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2 (2006).

239. Under these standards, agencies are required to develop "realistic timetable[s]" for surveys. *Id.* § 1.2.

240. The Bureau failed to take this basic requirement into account when it decided to implement the Rush Plan. The Rush Plan compresses the timeline for counting operations despite evidence of staffing shortages and heavier workload. The Plan attempts to accomplish a task—speedy delivery of results by December 31, 2020—that the Bureau has already deemed "impossible."

241. The standards also require agencies, including the Census Bureau, to "[e]ncourage respondents to participate to maximize response rates and improve data quality." Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2.3.2. This standard requires that the Census Bureau "[e]nsure that the data collection period is of adequate and reasonable length."

242. Again, the Rush Plan does not account for this standard. The Final Operational Plan and the COVID-19 Plan provided for over eleven weeks of Non-Response Follow Up, and up to five and six months, respectively, of post-collection data processing for the apportionment report. The Rush Plan, on the other hand, cuts the time allotted for counting by four weeks, without explaining how it will encourage more efficiency in collecting responses than the plan it reversed.

243. The standards also require the Bureau to plan for "an adequate number of contact attempts" to the respondent and to establish protocols for minimizing enumerator falsification, including "reinterviewing respondents." Office of Mgmt. & Budget, Standards and Guidelines

for Statistical Surveys, Directive No. 2, § 2.3.3.

244. With the Rush Plan significantly cutting the time available to conduct Non-Response Follow Up, it is expected that the Bureau will need to cut particular Non-Response Follow Up processes. This includes reducing the number of housing unit visits it earlier deemed necessary to enumerate a non-responsive household, or cutting back on enumerator reinterviews. Either decision will conflict with the Bureau's obligation to abide by federal statistical standards.

E. The Rush Plan Will Produce Low Quality and Inaccurate Data

245. Ultimately, Defendants' decision to rush completion of the 2020 Census will produce a significantly less accurate census than the COVID-19 Plan.

246. By cutting down the time allotted for door-knocking, the Rush Plan will result in fewer contact days by enumerators to non-responsive households, and less data collected by enumerators about those households.

247. The concerns about inaccuracy resulting from shortening time for Non-Response Follow Up are real and verified. A GAO review of the 2010 Non-Response Follow Up operation determined that local census offices with "higher percentages" of "less complete house-hold data" were more likely to have completed their Non-Response Follow Up in 53 days or less as compared to those offices that took a longer period of time. U.S. Gov't Accountability Office, *2010 Census: Data Collection Operations Were Generally Completed as Planned, but Long-Standing Challenges Suggest Need for Fundamental Reforms* (Dec. 2010), https://www.gao.gov/new.items/d11193.pdf.

248. As noted above, after the Bureau exhausts attempts to enumerate households through methods that render more accurate results, such as self-response and enumerator interviews, the Bureau turns to less accurate sources of data and statistical methods as a last resort to fill in missing information.

249. By curtailing Non-Response Follow Up, the Rush Plan will force the Bureau to resort to less accurate methods of data collection, well before the exhaustion of more accurate methods. Consequently, the Rush Plan will lead to the production of lower-quality information.

250. For instance, under the Final Operational Plan, the Bureau would not consider

low-quality administrative data before conducting the requisite number of contact days for a particular type of housing unit. By reducing the number of enumerator contact days, the Rush Plan will lead to reliance on these types of lower-quality data sources prior to exhausting the more accurate methods contemplated in the Final Operational Plan. Consequently, the Rush Plan will lead to more inaccuracies in the data.

251. Based upon past practices, the Bureau may also use whole-count imputation to calculate missing household data but to an extent and in ways not used previously. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household.

252. In previous censuses, the Bureau imputed upwards of 2.0% of households left over after exhausting its Non-Response Follow Up efforts. Under the time constraints of the Rush Plan, the Bureau will need to turn to imputation before exhausting its in-person enumeration efforts. One former Census Bureau Director estimates that, under the Rush Plan, the Bureau may end up imputing up to 10% of households.

253. Since data produced through the Bureau's current imputation methods are less accurate than data collected from enumerator interviews, Defendants' decision to rush completion of the 2020 Census will result in significantly less accurate total-population data than would have been produced under the COVID-19 Plan. This decline in accuracy will affect both the census's calculations of the total number of people living in the country and the census's recording of the characteristics of those people, and such inaccurate data will not meet the constitutional minimum for conducting the decennial enumeration or satisfy the "strong constitutional interest in accuracy" of the Census. *Utah v. Evans*, 536 U.S. 452, 478 (2002).

254. The Rush Plan will likely exacerbate the quality problems associated with imputation by compromising the Bureau's ability to collect the other kinds of data—such as self-responses, proxies, and administrative records—that it requires to impute most accurately. As noted above, imputation does not occur in isolation from the Bureau's other data sources, but in concert with them. With less data drawn from these other sources and less accurate data drawn from these other sources, the quality of the Bureau's imputation will decline.

255. The Rush Plan will also disrupt the post-collection data processing operations, described above. As noted by Secretary Ross and Director Dillingham in mid-April 2020, following Non-Response Follow Up the Bureau engages in "lengthy, thorough and scientifically rigorous" data processing, which is essential to ensuring an accurate census.

256. In announcing the new plan to rush the completion of the 2020 Census, Director Dillingham stated that the Bureau would "streamline" these operations in order to meet the December 31, 2020 deadline.

257. While the Director has not specified what this "streamlining" means for post-collection operations, the bottom line is that the Bureau cannot fully engage in the operations as contemplated in its Final Operational Plan on the shortened timeframe. As a result, the Bureau will have to cut or reduce its efforts to review and process collected data to ensure accuracy.

F. The New "Rush" Plan Will Create Confusion that Plaintiffs Will Be Forced to Spend Time and Money Counteracting

258. The new plan to rush completion of the 2020 Census also creates additional confusion about census operations at a critical moment in the census-taking process.

259. The Census Bureau's abrupt change will require groups and local governments engaging in Get Out the Count campaigns, including Plaintiff localities and Plaintiff organizations, to expend resources to correct confusion about the last date for counting in the 2020 Census.

260. As noted above, Plaintiff organizations and localities engaged in extensive public information campaigns that publicized the October 31, 2020 deadline.

261. The Rush Plan requires Plaintiffs to expend additional resources in order to update existing public materials, distribute new materials, and engage in more public-facing efforts to educate the public, their constituents, their members and/or constituents, and local organizations that the self-response period for the census ends on September 30, 2020.

262. For instance, in Harris County, officials ordered a mailing to constituents informing them that they had until October 31, 2020 to respond to the census. That order occurred before the August 3, 2020 decision to implement the Rush Plan. In light of the new

plan, the officials were forced to order stickers to cover the reference to October 31, 2020 on the mailer and to dedicate office staff to spend time affixing those stickers and updating the mailer. Similarly, Plaintiffs the City of Los Angeles, BAJI, and Urban League must update advertisements on social media to correct previous communications that referenced the October 31, 2020 deadline.

263. Apart from correcting misinterpretations arising from earlier statements Plaintiffs made in reliance on the Bureau's COVID-19 Plan, Plaintiffs must now also engage in more, unanticipated outreach to educate the public about the Census Bureau's Rush Plan decision. With one month less of counting, there is now increased urgency for non-responsive households to self-respond. As a result, Plaintiffs are developing new plans to reach more households and encourage more census participation.

G. The New "Rush" Plan Will Lead to Undercounting of Minorities

264. The new plan to rush completion of the 2020 Census will exacerbate undercounting of Black, Latino, and Native American communities.

265. As noted above, Non-Response Follow Up, is specifically designed to ensure that traditionally hard-to-count communities, including Black, Latino, and Native American communities are fully counted. By cutting Non-Response Follow Up short, the administration is disrupting the operation most essential to ensuring an accurate count for these communities.

266. For the 2020 Census, Black, Latino and Native American populations make up a disproportionate share of the population in tracts with the lowest self-response rates in the United States. For instance, as of July 23, 2020, one in five residents living in census tracts with the lowest self-response rates was Black, and one in four was Hispanic, far larger proportions than Black and Hispanic shares of the general population.

267. Consequently, Black, Latino, and Native American households will make up a disproportionate share of the Non-Response Follow Up universe.

268. Given the challenges of the shortened Non-Response Follow Up timeline, Black, Latino, and Native American households have a high likelihood of being missed, or inaccurately enumerated through administrative records and imputation. As noted above, these alternative

methods for enumeration will result in lower quality data for these groups.

269. The problem, however, is even more serious because it replicates and exacerbates problems the Census Bureau has found in prior censuses and has striven to correct in subsequent censuses. Data from previous censuses shows that Black, Latino, and Native Americans have historically been undercounted. Over-reliance on alternative methods of data to enumerate a disproportionate share of the population in these groups will further exacerbate potential undercounting in these groups during the 2020 Census.

270. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

271. Truncating Non-Response Follow Up will exacerbate undercounts of communities of color in at least two ways: first, by missing members of those communities entirely; or, second, by recording their characteristics incorrectly, such that the census results will not register them as members of communities of color. In either instance, data regarding communities of color will be inaccurate. This inaccuracy then deprives communities of color of federal funding, all the material support that flows from federal funding, the protections of the law, and political power at the federal, state, and local levels.

H. The New Rush Plan Has No Legitimate Justification

272. In announcing the Rush Plan, Defendants provided no express justification. Defendants stated in passing, however, that reporting of apportionment data to the President by December 31, 2020 is required by statute.

273. But there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980).

274. The Supreme Court thus determined that the government can and should substitute apportionment counts that have already been filed and certified with "newer, more

accurate version[s]." *Utah v. Evans*, 536 U.S. 452, 462 (2002).

275. Defendants have also recognized that, in the event of a conflict between the two, the constitutional requirement of a fair and accurate enumeration, rather than the statutory deadline, is the controlling legal requirement. With the COVID-19 pandemic threatening the health and safety of communities across the country, Defendants adjusted 2020 Census operations in the COVID-19 Plan, shifting the timeline by several months. Defendants did not wait for Congress to act to implement this plan, recognizing that the Plan was necessary to protect enumerators and respondents, and to ensure an accurate count.

276. Because of those delays, as the Bureau itself recognized, it was no longer possible for Defendants to produce data by December 31, 2020 that fulfilled their constitutional and statutory mandate. Specifically, the Bureau could not simultaneously pursue an accurate 2020 Census, and speed through completion of census-taking in order to report numbers to the President by the end of the year.

277. Several senior officials charged with actually conducting the 2020 Census confirmed the impossibility of this task throughout the summer, including approximately four weeks before Defendants' abruptly announced their decision to adopt the Rush Plan.

278. The statutory deadline at issue is not mandated by the Constitution. Taking the modest additional time necessary to ensure an accurate census, should not prevent a timely reapportionment, as elections for congressional seats impacted by reapportionment will not occur until 2022.

279. Ultimately, Defendants cannot sacrifice their mandatory *constitutional* obligation to make decisions reasonably related to producing an accurate count in order to comply with a pro forma *statutory* deadline. Congress clearly could not, for instance, satisfy its constitutional obligations by providing the Census Bureau with a single week in which to conduct the census. Strictly adhering to the December 31, 2020 deadline, as applied in extraordinary circumstances of the ongoing pandemic, would be equally unconstitutional.

I. Implementation of the Apportionment Exclusion Order

280. Defendants have not yet sought to justify their motivation for adopting the Rush

Plan, and it cannot be justified on the basis of artificial statutory deadlines. Instead, the timing of the abandonment suggests that the decision was influenced by a desire to implement the President's Executive Memorandum excluding undocumented immigrants from the apportionment count, thereby undercutting the contribution of communities of color to the calculations for equal representation for purposes of congressional apportionment (the "Apportionment Exclusion Order").

281. In late June 2020, the White House took the unprecedented step of adding two political appointees to Census Bureau staff with unspecified job duties. Neither appointee had an expertise in statistics, and both had a demonstrated history of partisan activity. These unusual appointees had previously engaged with the Census Bureau on questions about changing operations and methodology.

282. In mid-July 2020, White House officials reportedly asked congressional appropriators to include $1 billion in the next coronavirus stimulus bill for the purpose of completing the 2020 Census by the December 31, 2020 deadline.

283. This abrupt change in policy coincided with and was motivated by the President's July 21, 2020 issuance of the unconstitutional Apportionment Exclusion Order declaring that it is the policy of the United States to remove undocumented persons from the apportionment count, and requiring the Secretary of Commerce to produce estimates of the number of undocumented persons in the United States when reporting total population counts to the President. As noted, the Apportionment Exclusion Order is currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District.

284. Shortening the census timeline increases the likelihood that, regardless of the outcome of the November 2020 election, this President will have the opportunity to implement his Apportionment Exclusion Order. Delaying reporting until spring—as the COVID-19 Plan issued by the Census Bureau and Department of Commerce previously did—leaves open the possibility that the President will no longer be in office when data is provided, and thus will be unable to effectuate the Apportionment Exclusion Order.

285. Defendants did not justify their sudden, unexplained reversal of position with any evidence that Bureau officials had been wrong in stating, repeatedly, that it would be impossible to produce accurate counts by December 31, 2020. There is also no evidence that the decision to cut short counting operations was driven by the scientifically based judgment of Bureau personnel or external experts.

286. To the extent that Defendants' are motivated by a desire to implement the President's Apportionment Exclusion Order, that motivation is improper. It bears no reasonable relationship to the achievement of a fair and accurate census, and, under the circumstances currently facing the count, implementing the Apportionment Exclusion Order will undermine that goal.

287. Moreover, that Memorandum is just the latest attempt by the President and Secretary Ross to manipulate the census along racial and ethnic lines. Beginning in 2017, Secretary Ross attempted to add an untested citizenship question to the 2020 Census, claiming that the question was necessary to better enforce the Voting Rights Act. In reality, the administration was seeking block-level citizenship data so states could draw district lines in a manner that would disadvantage Black and Latino communities.

288. Defendant Ross's decision was litigated, and enjoined by three district courts. One of those cases ultimately ended up before the Supreme Court. There the Court found that Defendant Ross's stated Voting Rights Act rationale to support the addition of a citizenship question to the 2020 Census was "contrived" and vacated Defendant Ross's decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

289. On July 5, 2019, following the Supreme Court's decision, President Trump confirmed the real rationale—and fully justified the Supreme Court's holding that the administration's rationale for this census decision was pretextual—when he stated that the administration sought a citizenship question, not to enforce the Voting Rights Act, but rather "for districting" and "for appropriations." Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

290. Indeed, further evidence that Defendants' actions were pretextual arose from files of a prominent redistricting strategist, Thomas Hofeller. In 2015, Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." In the study, Hofeller recommended adding a citizenship question to the census so that states could use citizen voting-age population rather than total population to redistrict. This change in the redistricting base, in Hofeller's words, would be advantageous to "Non-Hispanic Whites" and would undercut the political power of Hispanics.

291. It was later revealed that Hofeller was involved in drafting portions of the memorandum from the Department of Justice to Defendant Commerce seeking addition of a citizenship question on the 2020 Census, including sections relating to the pretextual reason for requesting the question. *See* Ex. 8 to NYIC Pls.' Mot. for Sanctions at 124-31, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. July 16, 2019), ECF No. 635-1; Defs.' Opp. to Letter Mot. to Compel at 3, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Oct. 30, 2018), ECF No. 451.

292. Shortly after the Supreme Court's decision, President Trump issued an executive order, demanding executive agencies provide the Census Bureau with administrative records sufficient to allow the Bureau to determine "the number of citizens and noncitizens in the country." Exec. Order No. 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order explicitly states that the reason this data is necessary is to design "legislative districts based on the population of voter-eligible citizens," instead of total population. *Id.* at 33,823-84.

293. In light of that history, the Apportionment Exclusion Order, and the near-contemporaneous decision to cut counting operations short represent yet another attempt by the administration to manipulate the 2020 Census and potentially undercut the political power of communities of color. Defendants cannot rely on this memorandum as justification to support their decision to undermine the accuracy of the census.

V. Harm to Plaintiffs.

294. Plaintiffs and Plaintiff non-profits' members and/or constituents reside in locales

that will suffer harm as a result of Defendants' decision because that decision is very likely to cause these locales to be more disproportionately undercounted in the 2020 Census than they otherwise would have been.

295. On August 9, 2020, at the beginning of the Non-Response Follow Up operation, Plaintiff City of Los Angeles, had a response rate of just 53.1%, which was significantly lower than the 64.5% statewide response rate in California on that same date.

296. The Urban League, League of Women Voters, and BAJI have affiliates, constituents, and members in major cities across the United States. This includes cities where response rates were lower than their corresponding statewide response rates on the first day of Non-Response Follow Up including San Francisco (61.4%) and Monterey (60.5%) as compared to California (64.5%), Miami (49.6%) as compared to Florida (60.1%), Philadelphia (52%) as compared to Pennsylvania (65.5%), Detroit (48.7%) as compared to Michigan (68.9%), and New York City (54.9%) as compared to New York State (58.9%).

297. Plaintiffs Ellis and Garcia are residents of Houston, Texas. The response rate in Houston at the beginning of Non-Response Follow Up was 54%, which was lower than the statewide response rate for Texas on that date, 58.2%.

298. As noted above, Defendants' decision will result in fewer enumerations through Non-Response Follow Up, increased reliance on low-quality administrative data, and increased imputation. Consequently, Defendants' decision will result in cities' with higher rates of non-response (1) having less accurate data; and (2) experiencing higher rates of undercounting.

299. Because these cities have a higher proportion of households in the Non-Response Follow Up universe than their corresponding states, these cities have a substantially higher likelihood of being undercounted because of Defendants' decision than surrounding communities in their states. These disproportionate undercounts will cause Plaintiffs to suffer both fiscal and representational harm.

A. Funding Harms

300. The Rush Plan will result in loss of federal funding for Plaintiffs Harris County, City of Salinas, and the City of Los Angeles and the communities where members of Plaintiff

non-profits reside, including Miami, Detroit, Philadelphia and New York.

301. Over 130 programs and 675 billion dollars are allocated to states and localities on the basis of census-derived information. This includes funding to states for federal transportation planning purposes, education, and healthcare.

302. Many important federal programs, including Title I Grants under the Every Student Succeeds Act, require states to distribute funds to localities on the basis of census-derived information.

303. State Education Agencies must allocate Title I Grants, at least in part, on the number of children aged 5-17 living in poverty in a local education agency's jurisdiction.

304. Given that members of Plaintiff non-profits reside in cities that are likely to be more undercounted under the Rush Plan relative to surrounding communities in their states, including San Francisco, Miami, Detroit, Philadelphia, and New York City, Defendants' decision will likely deprive the communities where these members reside of Title I Grant funding they would have otherwise received. Similarly, Defendants' decision places Plaintiffs Ellis and Garcia's community at higher risk of deprivation of Title I Grant funding.

305. Several additional federal programs require states to use census-derived information to distribute funds directly to cities and counties, based on their share of a relevant population. For instance, the Low Income Home Energy Assistance Program, the Workforce Innovation and Opportunity Act program, and the Community Services Block Grant Program, all require states to distribute funds to cities and counties, at least in part, on the proportion of a state's low-income residents living in those cities and counties. This data is derived from information collected during the decennial census.

306. Both Harris County and the City of Los Angeles receive funds under these programs. Consequently, disproportionate undercounting of Harris County and the City of Los Angeles, as compared to their states, is likely to result in loss of funds under these and similar programs.

307. Several federal funding programs provide funding directly to cities and counties based on census-derived information. For instance, the Community Development Block Grant

program, and the Emergency Solutions Grant, allocate funding to cities and counties based, at least in part, on their share of the overall population count relative to other metropolitan areas.

308. Of cities with over 500,000 people, the City of Los Angeles had the fourth lowest response rate in the country, just behind Detroit and Philadelphia. Consequently, Los Angeles will likely lose Community Development Block Grant funds because of Defendants' decision.

309. Similarly, members of Plaintiff non-profits live in major metropolitan areas with some of the lowest response rates in the country, such as Miami, Detroit and Philadelphia. Defendants' decision will likely deprive these members' communities of funding under the Community Development Block Grant program.

310. Finally, the allocation of federal transportation including the Surface Transportation Block Grant Program, and the Metropolitan and Statewide Nonmetropolitan Transportation Planning Programs are based on the population of urbanized areas in a state compared to those of other states, as determined by the decennial census.

311. Plaintiffs Ellis and Garcia regularly drive on highways and roads in Texas. Disproportionate undercounting of urbanized areas in Texas during the 2020 Census will result in reduced transportation funding for Texas under federal transportation programs.

B. Representational Harm

312. Defendants' decision will also likely result in representational harm to individual Plaintiffs and to the members of Plaintiff organizations.

313. Plaintiffs Ellis and Garcia reside in Houston, Texas. In terms of self-response rates, Texas ranks 39th in the United States. Approximately four million Texas households are in the Non-Response Follow Up universe, which is more households than any state other than California.

314. Consequently, Defendants' decision will not only cause a substantial undercount in Texas, but that undercount will likely be disproportionate as compared to other states. Texas will likely be deprived of its fair share of representation in the next congressional apportionment.

315. As a result, Defendants' decision is likely to result in reduction of voting power and representation for Plaintiffs Ellis and Garcia, because it will likely cause the loss of a seat in

Texas, and will result in fewer Representatives spread out over the state of Texas.

316. As for Plaintiff City of Los Angeles, at least one study has predicted that, were California to lose a congressional seat because of the final census count, that seat is very likely to come from a district that includes portions of South Los Angeles, thus reducing the city's representational delegation.

317. Defendants' decision will also cause Plaintiff Ellis and members of Plaintiff non-profits to experience a loss of intrastate voting power.

318. By causing disproportionate undercounting of communities in Houston, Detroit, Philadelphia, and Miami, as compared to their corresponding states, Defendants' decision will result in drawing of district lines that do not accurately represent the population of the state, and disadvantage Plaintiffs Ellis and Garcia, and members of Plaintiff organizations that live in undercounted communities.

C. Inaccurate Data

319. Plaintiff local governments will suffer harm from the adverse impact Defendants' decision will have the accuracy of population counts produced by the Census Bureau. Plaintiff local governments often rely on accurate information collected by the Census Bureau for crucial public planning purposes, including planning for how to respond to emergencies.

320. For example, local governments often rely on a Social Vulnerability Index to identify communities that are at high risk during a particular emergency. Government officials rely on this index to determine where to allocate resources before and during emergencies. A Social Vulnerability Index use census data to identify specific populations that may be vulnerable to a particular emergency, including data relating to age, housing density, income status, and race and ethnicity. Inaccurate census data would make disaster planning and emergency response more difficult, and could disrupt important public programs.

321. In Harris County, officials used the Center for Disease Control's Social Vulnerability Index to inform decisions about proper distribution of COVID-19 Relief Funds. The funds were allocated to provide relief to Harris County residents most impacted by the global pandemic. That Social Vulnerability Index, which was based on census data, was used to

identify census tracts with the most vulnerable residents, and applications from residents from those tracts were prioritized and given higher chances of acceptance for funds. Without accurate census data, Harris County would struggle to ensure that crucial relief funds were reaching the communities most in need of them.

322. Similarly, King County relies on accurate census data to inform its public-policy decision making. For instance, the county uses census data to plan public-transit service, and to ensure priority populations have transit access, and to site public health clinics.

323. The low-quality data and undercounting that Defendants' decision will cause will also harm Plaintiffs. For instance, undercounting of Black, Latino, Native American, and immigrant communities will negatively affect the Urban League, League of Women Voters and BAJI by undermining these organizations' core missions of promoting equal and just laws and empowering vulnerable communities through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities they serve.

D. Expending Additional Resources

324. Plaintiff organizations, the Urban League, the League of Women Voters, and BAJI, and Plaintiff local governments, City of San Jose, Harris County, King County, City of Salinas, and City of Los Angeles will need to expend additional resources and divert resources from planned programs and projects in order to address the adverse consequences of Defendants' decision to abandon the COVID-19 Plan, and implement the Rush Plan.

325. Plaintiffs' planned efforts to ensure the effective enumeration of historically undercounted communities were based on the understanding that the Census Bureau would implement the Non-Response Follow Up operation contemplated in the Final Operational Plan and adjusted in the COVID-19 Plan.

326. The abrupt reversal of the COVID-19 Plan, and the implementation of curtailed Non-Response Follow Up in the Bureau's Rush Plan will adversely affect Plaintiffs' plans.

327. Plaintiff organizations and local governments will likely need to adjust plans, and divert resources from other planned activities and programs in order to ensure the communities

they serve are adequately counted. Specifically, Plaintiffs will need to recruit and train staff to engage in increased and expanded outreach to potential non-responsive households in order to make up for fewer enumerator visits, or to other aspects of the Non-Response Follow Up program, such as the reinterview process.

328. For instance, Plaintiff BAJI is planning significant adjustments to its 2020 Census outreach plans in light of Defendants' decision, that include diversion of resources from other sources, and significant expenditures. In order to engage in effective outreach, BAJI needs organizing staff dedicated to civic engagement. With Non-Response Follow Up occurring from August 11, 2020 through October 31, 2020, BAJI anticipated that it could spread its staffing resources over that timeframe to ensure it was meeting its goals within the organization's budget. However, on a shorter timeframe, BAJI needs additional staff on a shorter timeframe, which will require adjusting the organization's budget and priorities for the next several months.

329. The adjustment is also challenging for BAJI as the organization caters to immigrant communities with a variety of language needs. Increasing staffing on a short timeframe poses significant challenges for the organization, because it must locate staff that can communicate with the particular community that the organization is targeting for outreach efforts.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of the Enumeration Clause, and Fourteenth Amendment
(U.S. Const. art. I, § 2; U.S. Const. amend. XIV, § 2)

330. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

331. Under the Enumeration Clause of the U.S. Constitution, Congress, and, by delegation, the Secretary of Commerce, must conduct an "actual Enumeration" of the population. This clause requires that decisions relating to census-taking "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996).

332. The COVID-19 pandemic severely disrupted the 2020 Census, resulting in

months of suspended operations and significant delays in crucial counting processes. Moreover, the public-health crisis continues to impact census operations, as the Bureau struggles to retain enumerators and engage in door-knocking in communities experiencing surges of the virus.

333. To navigate this emergency, the Bureau took necessary action to adjust its operational timelines in the COVID-19 Plan while seeking to maintain the operations and processes included in the Final Operational Plan that had been designed to help ensure a complete and accurate count.

334. Abruptly and without explanation, on August 3, 2020, Defendants abandoned the COVID-19 Plan and implemented the Rush Plan. The Rush Plan does not "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." After delaying all operations for months, the Bureau and its staff repeatedly recognized that it was impossible to produce counts consistent with their duties to ensure a full, fair, and accurate count by December 31, 2020. Indeed, current conditions demonstrate that it is infeasible to obtain a fair and accurate count by the end of the year. Nevertheless, the Defendants abandoned their constitutionally mandated pursuit of fair and accurate data, in favor of the speed of the Rush Plan, and the inaccurate data it will produce.

335. Under these circumstances, the decision to curtail crucial 2020 Census operations violates the Enumeration Clause of the United States Constitution.

336. 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 Administrative Procedure Act—Arbitrary and Capricious
(5 U.S.C. § 706(2)(A))

337. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

338. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Rush Plan is final agency action because it marks the consummation

of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

339. In determining whether an action violates the APA, courts consider whether the agency examined relevant data and articulated a satisfactory explanation for its decision, including formulating a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency wishes to depart from an earlier decision, it must acknowledge that change and any reliance interests its previous actions engendered. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015).

340. The Bureau spent several years developing its Final Operational Plan for the 2020 Census. That plan carefully determined the required length of each operation, including the appropriate length for data-collection and data-processing. It also included details about the implementation of the various operations.

341. The COVID-19 pandemic disrupted census operations, and the Bureau responded by adjusting its operations in its COVID-19 Plan. That plan involved retaining the details and the length of time of various operations laid out in the Final Operational Plan, but shifting the timeline for counting several months into the future to account for both the necessity of those operations and the public-health emergency.

342. The Bureau began implementing the plan, and critical operations were suspended and delayed through the summer. Bureau officials publicly and expressly recognized that it was no longer possible to comply with the December 31, 2020 deadline if the Bureau intended to fulfill its constitutional and statutory obligation of producing reasonably accurate population counts.

343. Without explanation and without citing any evidence, Defendants suddenly changed their position and issued a new plan with shortened timelines. Among other things, that change conclusively changed the legal rights and obligations of private households, who now have substantially less time to respond if they wish to be counted in the 2020 Census. Defendants

have provided no evidence to support rescinding the COVID-19 Plan, have failed to acknowledge or explain their departure from their previous conclusions as to the length of time necessary for an accurate census, and have cited no evidence that they could obtain accurate counts on the shortened timeframe. Defendants' unexplained and unjustifiable reversal is precisely the sort of arbitrary and capricious agency action that the Administrative Procedure Act forbids.

344. Defendants' decision also fails to account for several factors relevant to the decision, including the multiple-month long suspension in operations and delay of crucial census operations, the staffing shortages facing the Bureau, the meticulously designed and tested technical requirements for effective enumeration included in the Bureau's Final Operational Plan, and the various quality-control measures the Bureau must engage in to ensure that its reported data is accurate.

345. Consequently, Defendants' action is arbitrary and capricious.

346. This unlawful action has caused, is 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.

THIRD CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Pretext
(5 U.S.C. § 706)

347. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

348. Under the Administrative Procedure Act, agencies are required to disclose the "genuine justification[] for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2569, 2575-76. Courts will not accept "contrived reasons" provided by agencies as that would defeat the purpose of judicial review. *Id.* at 2576. Moreover, agencies cannot simply avoid providing reasoning for their decision-making altogether.

349. Defendants have decided to cut crucial operations in order to produce 2020 Census population results to the President by December 31, 2020. In announcing that decision, Defendants provided no legitimate justification for abandoning the COVID-19 Plan and

implementing the Rush Plan.

350. Any attempt by the Defendants to rely on the reporting deadline provided under the Census Act as justification for their decision is mere pretext. 13 U.S.C § 141(b).

351. For months, Defendants implemented the COVID-19 Plan, the timeline for which necessarily assumed the statutory deadlines could not defeat the constitutional duty to conduct an accurate enumeration, as applied to the extraordinary circumstances at hand. Defendants made significant adjustments, including months-long delays of census operations, on the assumption that the Bureau could and would conduct a full and robust count through the end of October 31, 2020. Since mid-April 2020, Defendants have expressly and publicly recognized that the Bureau could not provide a complete and accurate count by December 31, 2020. And President Trump maintained that the statutory deadlines need not be followed.

352. Defendants' reversal of position on the 2020 Census timeline appears driven by Defendants' efforts to ensure implementation of the President's unconstitutional Apportionment Exclusion Order, which attempts to exclude undocumented persons from the apportionment count and continues a long-running pattern of racially discriminatory and improperly politically motivated conduct of the 2020 Census.

353. In light of these considerations, Defendants' purported justification is pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

354. Defendants' unlawful action has caused, is 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.

PRAYER FOR RELIEF

355. Plaintiffs respectfully request that this Court:

356. Declare that Defendants' promulgation of the Rush Plan, and corresponding revocation of the COVID-19 Plan is unconstitutional under the Enumeration Clause, and unlawful under the Administrative Procedure Act.

357. Vacate the Rush Plan, thereby reinstating the COVID-19 Plan.

358. Enjoin Defendants from implementing the Rush Plan or otherwise unlawfully

interfering with the COVID-19 Plan.

359. Award Plaintiffs costs, expenses, and reasonable attorneys' fees.

360. Award any other relief the Court deems just and proper.

Dated: August 18, 2020

LATHAM & WATKINS LLP

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 18, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
Sadik Huseny

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
NATIONAL URBAN LEAGUE; BLACK ALLIANCE FOR JUST IMMIGRATION; LEAGUE OF WOMEN VOTERS; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; and CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS, and ADRIAN GARCIA

(b) County of Residence of First Listed Plaintiff New York City, NY
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DEFENDANTS
WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, and STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau

County of Residence of First Listed Defendant Washington County, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury – Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities–Employment
- ☐ 446 Amer. w/Disabilities–Other
- ☐ 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

OTHER
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC § 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. 701 et seq.

Brief description of cause:
Action to set aside unlawful agency action as arbitrary, capricious, and not in accordance with law, and declare Defendants' actions unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE Judge Lucy H. Koh DOCKET NUMBER 5:20-cv-05167-LHK; 5:20-cv-05169-LHK

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☐ **SAN FRANCISCO/OAKLAND** ☒ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 08/18/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Sadik Huseny

Sent: 8/18/2020 2:30:59 PM
Subject: FW: Here's the National Urban League complaint
Attachments: US_DIS_CAND_5_20cv5799_COMPLAINT_for_Declaratory_and_Injunctive_Relief_Fi.pdf

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

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS; and ADRIAN GARCIA,

Plaintiffs,

v.

WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce; U.S. DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; and U.S. CENSUS BUREAU,

Defendants.

CASE NO. 20-cv-5799

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the unconstitutional and illegal decision by Secretary of Commerce Wilbur Ross, and Census Bureau (the "Bureau") Director Steven Dillingham, to sacrifice the accuracy of the 2020 Census by forcing the Census Bureau to compress eight and a half months of vital data-collection and data-processing into four and a half months, against the judgment of the Bureau's staff and in the midst of a once-in-a-century pandemic.

2. The Census Bureau's staff spent most of the past decade developing a final operational plan for the 2020 Census that reflected the Bureau's understanding of the best methods for counting everyone once and in the right place (the "Final Operational Plan"). In April 2020, as the COVID-19 pandemic spread throughout the country, the Census Bureau revised its plan to account for both the difficulties of census-taking during a pandemic and the Bureau's constitutional and statutory obligation to achieve a fair and accurate count (the "COVID-19 Plan"). To achieve both ends, the Department of Commerce and the Census Bureau delayed the counting process, shifted the timeframe for conducting and completing its data-collection operation, and increased the time for conducting data-processing, while, crucially, preserving the same amount of time for each step of those operations.

3. On August 3, 2020, the Department of Commerce and the Census Bureau suddenly and without explanation reversed course and replaced the Bureau's COVID-19 Plan with a new one (the "Rush Plan"). The Bureau's Rush Plan requires the Bureau to complete eight and a half months of data-collection and data-processing in half the time. It ignores the multi-month delay in census data-collection that the COVID-19 pandemic caused. It compels a final date for delivering apportionment data to the President that Bureau officials have repeatedly asserted they cannot meet. And it threatens a massive undercount of the country's communities of color and the municipalities, cities, counties, and states where they live. Under these circumstances, the Bureau's new plan to rush the 2020 Census violates, among other things, the federal government's legal obligations to secure an accurate count and statutory prohibitions on arbitrary, capricious, and pretextual federal government action.

4. The federal government's attempt to rush the census count poses a grave threat to

all the vital functions that rely on census data, from reapportioning the United States House of Representatives and redrawing state and local electoral districts, to equitably distributing over $1.5 trillion annually in federal funds that support basic needs such as food, health care, and education. Undercounted cities, counties, and municipalities will lose representation in Congress and tens of millions of dollars in funding. And communities of color will lose core political power and vital services. In contrast to these dire stakes, the immediate solution to this problem is simple: set aside and enjoin implementation of the impossibly-shortened Rush Plan, which is based on an unexplained change of position, and allow the Census Bureau to implement the plan that it had designed to fulfill its constitutional duties during the pandemic.

5. The COVID-19 pandemic upended all 2020 Census field operations, many of which the Census Bureau designed to enumerate populations that it has long struggled to count, including racial and ethnic minorities, non-English speakers, and undocumented persons. Among the disrupted census operations was the largest, most time-consuming operation undertaken to count the country's hard-to-count communities—the "Non-Response Follow Up" operation. During Non-Response Follow Up, the Bureau sends its employees to knock on the doors of households that have not yet responded to the census and perform other vital data-collecting functions.

6. The Bureau's staff responded to the pandemic—and the impossibility of conducting house visits during widespread lockdowns—by making necessary adjustments to the timeline in the Final Operational Plan. This revised operational plan, the COVID-19 Plan issued on April 13, 2020, was intended to ensure that hard-to-count communities would be enumerated and the health and safety of Bureau employees and the public would be protected. This plan adjusted the deadlines of, but did not shorten the time for, critical operations. Under this plan—which experts and census stakeholders alike endorsed as a scientifically sound approach for minimizing the pandemic's potential damage to the accuracy of the count—the Bureau extended its data-collection deadlines to October 31, 2020 and its data-processing deadlines into the second quarter of 2021. Critically, the COVID-19 Plan delayed door-knocking by three months, pushing it from May–July 2020 to August–October 2020. But the COVID-19 Plan

acknowledged that the Bureau must spend the same amount of time—around eleven and a half weeks—on door-knocking, just as it had planned to do before the pandemic. The COVID-19 Plan also incorporated the same methods and techniques contemplated in the Final Operational Plan that the Bureau had spent years developing. Indeed, the only respect in which the COVID-19 Plan altered the amount of time devoted to operations set out in the Final Operational Plan was a requirement that the Bureau spend *more* time than originally planned *processing* the data it collected—that is, performing the necessary work to transform over 100 million individual census forms into high-quality, reliable, and legitimate data. This additional investment in data-processing reflected daunting new challenges the COVID-19 pandemic posed to an accurate count, including massive displacements of people that would introduce problems of duplicate responses, responses without unique census identifiers, and other complex data issues.

7. The Department of Commerce and the Census Bureau also recognized that the impact of COVID-19 had made it impossible to meet certain statutory deadlines for reporting census results to Congress. Commerce Secretary Wilbur Ross and Census Bureau Director Steven Dillingham announced that the Bureau was seeking relief from Congress to formally extend two statutory deadlines: first, the deadline for reporting the state-population totals used to calculate the congressional apportionment to the President, which Congress was asked to extend from December 31, 2020 to April 30, 2021; and, second, the deadline for reporting redistricting data to the states, which Congress was asked to extend from March 31, 2021, to July 31, 2021. Commenting on the statutory-deadline extensions, President Trump publicly stated on April 13, 2020, "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

8. Recognizing that more time was necessary to complete an accurate census, and consistent with the President's statement, the Bureau proceeded immediately under its COVID-19 Plan. The Bureau delayed its door-knocking operation to late summer, with the declared

intention of completing it by October 31, 2020. And recognizing that a successful census is dependent on all levels of government working together, the Bureau publicized this plan to the public, as well as to government and non-profit partners involved in the years-long and multi-million-dollar public education campaign to ensure public trust and encourage public participation in the census.

9. Throughout the summer, Bureau officials repeatedly stated that the pandemic had rendered it impossible for the Bureau to complete a reasonably accurate count by December 31, 2020. But to comply with its constitutional obligations, the Bureau continued collecting data on the timelines set in the COVID-19 Plan, which itself extended the Bureau's data-processing timelines into 2021.

10. On August 3, 2020—in the face of a pandemic that has only grown worse and in disregard of the Census Bureau's constitutional and statutory duties to conduct an actual enumeration of the entire population—Secretary Ross and Director Dillingham abruptly abandoned the COVID-19 Plan. Without explanation, they announced the new Rush Plan for the 2020 Census, including shortening the Bureau's data-collection operation by one month to September 30, 2020, and requiring the Bureau to process and report the apportionment data to President Trump by December 31, 2020. The Rush Plan cuts a crucial four weeks from the data-collection operation. And it disregards the Bureau's own prior conclusions that such rushed processing renders it impossible to fulfil its constitutional obligation to ensure reasonable quality and accuracy of 2020 Census data.

11. Defendants' decision to abandon the COVID-19 Plan in favor of the Rush Plan does not satisfy the Supreme Court's clear command that any decision relating to the census bear a "reasonable relationship" to producing an accurate count. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996). As demonstrated by Defendants' own prior statements, the challenged decision cannot be justified by any legitimate interest in conducting an accurate census, and in fact will introduce several inaccuracies in the count, chief among them major undercounts of communities of color.

12. The reason for this abrupt change of position is not apparent on the face of the

press release announcing the Rush Plan or any other subsequently issued statements or publications from the federal government. The Bureau has refused requests from Congress and at least one Plaintiff in this action to provide one.

13. The announcement of the Rush Plan did reference two developments that occurred between the adoption of the COVID-19 Plan and the announcement of the Bureau's intent to adopt the Rush Plan. But neither of these developments can justify Defendants' actions. First, the announcement refers to the Secretary of Commerce's direction to the Bureau to comply with the statutory deadline of December 31, 2020 for completing the apportionment count. But this statutory deadline cannot justify an unconstitutional decision to cut short crucial operations and fail to satisfy its constitutional obligation. A statutory deadline, particularly one that was set without a global pandemic in mind, cannot override the federal government's constitutional duty to accomplish an accurate census; there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980). Moreover, the Bureau was cognizant of this deadline even as it designed and implemented the COVID-19 Plan, including delaying crucial field operations by several months. And Bureau officials have repeatedly made clear that because of the impediments introduced by COVID-19, together with the multi-month delay, it is *already* too late to satisfy these pre-COVID-19 deadlines.

14. Second, both the text of the Rush Plan announcement and the timing of the decision suggest that the federal government's motivation for the Rush Plan is to facilitate another illegal act: suppressing the political power of communities of color by excluding undocumented people from the final apportionment count. On July 21, 2020—just a few weeks earlier—President Trump issued a Presidential Order titled "Memorandum Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census" (the "Apportionment Exclusion Order")—which expressly stated the President's determination to exclude undocumented people from the population count used for apportionment. To increase the chance that the President can fully effectuate the Apportionment Exclusion Order, he must receive the population totals while he is still in office, and he ordered the Secretary of Commerce to provide

him with 2020 decennial census information by December 31, 2020 to carry out his objective.

15. The President's Apportionment Exclusion Order (currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District) represents only the most recent of Defendants' serial attempts to manipulate the 2020 Census to suppress the political power of communities of color. These attempts started with a campaign to introduce a historically unprecedented and untested citizenship question onto the 2020 Census questionnaire to advantage—in the words of a deceased Republican redistricting consultant—"Republicans and non-Hispanic whites." Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. Since the Supreme Court blocked the question, Defendants have looked for other means to achieve that same end, including collecting data on citizenship from administrative records and, now, cutting the census short.

16. Plaintiffs are local governments, civil rights and civic organizations, and individuals whose communities will almost certainly be inaccurately represented and underrepresented in the final census count if the administration succeeds in truncating census data-collection and data-processing.

17. Plaintiffs seek declaratory relief affirming that Defendants' actions violate the Enumeration Clause and the Administrative Procedure Act. Plaintiffs additionally seek to set aside and enjoin implementation of the illegal Rush Plan, thereby permitting the Bureau to implement the preexisting COVID-19 Plan it carefully designed to ensure a complete and accurate count. This relief will allow the Bureau to conduct the 2020 Census on the timeline it has repeatedly asserted is necessary to complete a full, fair, and accurate count.

18. Without such relief, Plaintiffs and the communities they represent will suffer irreparable harm for at least another decade, until the next census is conducted.

JURISDICTION AND VENUE

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

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

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

22. The proper intradistrict assignment for this action is the San Jose Division, in light of the location of Plaintiffs City of San Jose and members of the League of Women Voters.

PARTIES

I. Plaintiffs

23. The National Urban League ("Urban League") is a civil-rights organization with over 90 affiliates serving 300 communities in 37 states and the District of Columbia. Founded in 1910, the National Urban League is headquartered in New York City. The mission of the National Urban League is to help African Americans and others in underserved communities achieve their highest human potential and secure economic self-reliance, parity, power, and civil rights.

24. For the 2020 Census, the Urban League has expended substantial resources developing programs designed to encourage self-response and cooperation with Census Bureau offices in historically undercounted communities. Specifically, the organization has engaged in efforts to educate the public about the census through various methods, including virtual town halls, production and distribution of toolkits, workshops for locally based get-out-the-count organizations, and publication and upkeep of a website, www.MakeBlackCount.org, to disseminate critical information about the census. The Urban League has also worked with Census Bureau regional offices to encourage enumerator recruitment, and the organization uses social media to encourage 2020 Census participation.

25. Plaintiff Black Alliance for Just Immigration ("BAJI") is a nonprofit organization organized and existing under the laws of California, with offices and members across the country, including in Oakland, California, Miami, Florida, Atlanta, Georgia, and New York City.

BAJI collaborates with African Americans and Black immigrants to organize and advocate for equal and just laws in their communities. BAJI campaigns to advance racial justice and provides partner organizations with varied assistance—particularly on immigration policy—and it spends significant resources educating its partner organizations, individuals, and other constituents through presentations, workshops, publications, technical assistance, and trainings. BAJI is a membership organization, and its members either pay dues or volunteer their time to support the organization. Members also actively participate in BAJI's self-governance and decision-making at the local level.

26. For the 2020 Census, BAJI has worked to ensure non-responsive households in Black and immigrant communities are counted. BAJI has hired additional staff dedicated to engaging local communities on the census, and has engaged in outreach using social media and mailers to bolster self-response. In addition, since the outbreak of the COVID-19 pandemic, BAJI staff regularly participate in webinars and virtual events to provide the public more information about the census, with a specific focus on encouraging participation in Black and immigrant communities.

27. The League of Women Voters is a nonprofit civic organization that encourages informed and active participation in government. Founded in 1920, the League of Women Voters is headquartered in Washington, D.C. The League of Women Voters has over 800 state and local affiliates, located in all 50 states and in 764 specific communities, including affiliates with members in San Francisco and Monterey County, California, Detroit, Michigan, Miami, Florida, Philadelphia, Pennsylvania, and New York City. The League of Women Voters seeks to empower voters and defend democracy. The League of Women Voters has over 65,000 members nationwide, and its members either pay dues or volunteer their time to support the organization.

28. The League of Women Voters has engaged in significant efforts to ensure historically undercounted communities are enumerated during the 2020 Non-Response Follow Up operation. Prior to the outbreak of COVID-19 in the United States, the League of Women Voters and its affiliates participated in public events across the country aimed at providing information about the census to undercounted communities. Since March of this year, the League

of Women Voters has shifted to a digital public-education campaign, encouraging education and participation through social media, email listservs, webinars, and blog posts. Affiliates in Kansas, South Carolina and Maine are also participating in state Complete Count Committees that seek to increase awareness of the 2020 Census, improve participation, and coordinate with Census Bureau officials.

29. Harris County, Texas is a political subdivision of the State of Texas. With over 4.7 million residents, Harris County is the third largest county in the United States. The county's population is over 43% Latino, 20% Black, over 7% Asian, and over 28% non-Hispanic White. During the 2010 Census, 65.1% of households in Harris County self-responded to the census. As of August 14, 2020, 58.3% of households in Harris County had self-responded to the 2020 Census. This response rate in Harris County was well below the national response rate on that date, 63.6%.

30. For the 2020 Census, officials in Harris County engaged in extensive efforts to encourage participation in the County. County officials formed a Complete Count Committee with city officials in Houston that engaged in public education about the census, and built partnerships with local Census Bureau officials to coordinate outreach efforts. In addition, in 2019, the County approved a budget of nearly $4 million dollars to conduct outreach during the 2020 Census. To that end, the County has contracted with vendors to conduct surveys about the opinions and attitudes of non-responsive populations and develop a digital advertising campaign on Facebook and Instagram to encourage 2020 Census participation. And the County receives substantial federal funding tied to census data.

31. King County is a political subdivision of the State of Washington. Over 2.2 million people live in King County, making it the most populous county in Washington. As of August 14, 2020, 26.1% of households in King County had not responded to the 2020 Census. The county has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, King County had nearly 12,000 residents experiencing homelessness, the third highest total of any locale in the country. The Seattle metro area, which includes King County, is estimated to have 140,000

undocumented immigrant residents.

32. King County worked in partnership with local cities to provide $1.17 million to community-based organizations serving historically undercounted communities. Specifically, King County sought to fund organizations that work with communities that are Limited English Proficient. Through this funding, these organizations produced public education materials related to the 2020 Census, and developed campaigns to get-out-the-count. And King County, too, receives substantial federal funding tied to census data.

33. The City of Los Angeles, California is a municipal corporation organized and existing under the laws of the State of California, and is a charter city pursuant to Article XI of the California Constitution. The City is home to roughly 4 million people, and is located in the county recognized by the Census Bureau as the hardest to count in the nation. The city's population is a large contributor to the County's hard-to-count status as more than half of the City's residents live in census tracts that are hard to count. As of August 14, 2020, only 53.8% of the City's households had responded to the 2020 Census—well below the statewide average of 65.1% and even further below the City's own 2010 self-response rate of 68 percent.

34. As a result of its hard-to-count status, Los Angeles has engaged in years of planning and devoted significant resources to developing a strategy for an accurate count, tailored to the unique challenges of the City's population. To fund these efforts, the City has overseen distribution of roughly $2 million dollars to community-based organizations and the investment of almost $1.5 million of both City general fund and grant money in its own efforts. And the City of Los Angeles also receives substantial federal funding tied to census data.

35. The City of Salinas, California is a political subdivision of the State of California. Salinas is the most populous city in and the government seat of the County of Monterey. The city is home to more than 150,000 people, including 38.5% of the county's "hard-to-count" population. As of August 14, 2020, 57.2% of all households in Salinas have responded to the 2020 Census, which is 422nd out of all 482 California cities. The current response rate is 7.9 percentage points below California's statewide average for self-responses and more than 10 percentage points below Salinas's self-response rate from the 2010 Census.

36. Salinas has dedicated significant resources to funding and staffing its "Census Action Team," which is composed of city staff and representatives from the County of Monterey's "Complete Count Committee," as well as community-based organizations, school districts, and local businesses. The city's population is more than 75% Latino, and more than 1 in 5 households have limited English-language proficiency. As part of its outreach, the Salinas Census Action Team engages religious and community organizations, such as local food banks, to assist with enumeration efforts in the Latino community and all communities of color as these organizations are able to assist with trust and communication barriers that can make these groups hard to count. The City of Salinas also receives substantial federal funding tied to census data.

37. The City of San Jose is a political subdivision of the State of California. San Jose has over 1 million residents, making it the largest city in Northern California, and the tenth largest city in the United States. San Jose's population is 32% Latino, and 35% Asian, and nearly 40% of residents are foreign born. As of August 14, 2020, 28% of households in San Jose had not responded to the census. San Jose has large populations of historically undercounted communities. For instance, according to the Department of Housing and Urban Development, in 2019, San Jose had over 6,000 residents experiencing homeless. In addition, the San Jose metro area is estimated to have over 150,000 undocumented immigrant residents.

38. The City of San Jose has engaged in extensive public-education and get-out-the-count efforts during the 2020 Census. San Jose has formed a Complete Count Committee with Santa Clara County, and nearly 90 community-based organizations. The Committee focuses on raising awareness of the census in historically undercounted communities. San Jose also disseminates information about the census to the public through city departments and offices. San Jose also worked closely with the Census Bureau to recruit qualified bilingual enumerators. The City of San Jose receives substantial federal funding tied to census data.

39. Plaintiff Rodney Ellis is the Commissioner for Precinct One on the Harris County Commissioners Court. He is a resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Ellis regularly drives on roads and highways in Harris County.

40. Plaintiff Adrian Garcia is the Commissioner for Precinct Two on the Harris County Commissioners Court. He is a life-long resident and citizen of Harris County, where he is registered to vote and regularly exercises his right to vote. Commissioner Garcia also regularly drives on roads and highways in Harris County.

II. Defendants

41. Defendant Wilbur L. Ross is the Secretary of the U.S. Department of Commerce and is sued in his official capacity. Secretary Ross oversees the U.S. Department of Commerce and the Census Bureau. Congress has delegated the responsibility for carrying out the decennial census to the Secretary of Commerce. 13 U.S.C. § 141(a).

42. Defendant U.S. Department of Commerce is a cabinet agency within the Executive Branch responsible for administering the decennial census.

43. Defendant Steven Dillingham is the Director of the U.S. Census Bureau and is sued in his official capacity.

44. Defendant U.S. Census Bureau is an agency within the Department of Commerce responsible for planning and administering the decennial census. 13 U.S.C. § 2.

FACTUAL ALLEGATIONS

I. Defendants' Constitutional and Statutory Obligations.

45. Under the United States Constitution, the federal government must conduct an "actual Enumeration" of the population once every ten years. U.S. Const. art. I, § 2.

46. The population totals produced by the decennial enumeration are used to apportion congressional representatives to the various states. *Id.* Census figures are also used in state and local redistricting and in the distribution of federal funds to communities across the United States.

47. The Enumeration Clause requires that decisions relating to the census bear a "reasonable relationship" to the constitutional purpose of the enumeration. *Wisconsin*, 517 U.S. at 20.

48. Similarly, the Census Act imposes a mandatory duty on the Secretary of Commerce to "conduct a census that is accurate and that fairly accounts for the crucial

representational rights that depend on the census and the apportionment." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

49. Consequently, the Secretary of Commerce and the Census Bureau are constitutionally obligated to make decisions in conducting the census that are reasonably related to achieving a fair and accurate calculation of the population of the United States.

II. The Census Bureau's Pre-COVID-19 Operational Plans for the 2020 Census.

50. For the 2020 Census, the Census Bureau spent the better part of a decade designing operations to fulfill its constitutional and statutory mandate, including: soliciting and incorporating feedback from seasoned experts, advisors, and community groups; testing various features of its data-collection and data-processing operations; and ensuring that its decisions for conducting the census reflected sound, scientifically based judgment.

51. To this end, the Bureau created an operational plan to guide its efforts, including its efforts to collect data from census respondents and to process that data into usable forms for constitutionally and statutorily mandated purposes, including reapportionment and redistricting.

52. On December 31, 2018, the Bureau promulgated the final version of its operational plan, which the Bureau called "Version 4.0" (hereinafter referred to as the "Final Operational Plan"). *See* U.S. Census Bureau, Final Operational Plan (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf. In the Final Operational Plan, the Census Bureau stated that its goal for the 2020 Census is to "count everyone once, only once, and in the right place."

53. Under the Paperwork Reduction Act, the Office of Management and Budget must review and approve the plans for any federal survey, including the decennial census, to ensure that those surveys meet government standards, minimize respondent burden, and maximize the utility of the collected information. 44 U.S.C. § 3504(c).

54. The Office of Management and Budget formally reviewed and approved the Census Bureau's pre-COVID-19 plans for the decennial census, including the Final Operational Plan.

55. The Final Operational Plan includes over 200 pages of detailed and transparent

conclusions for achieving the 2020 Census's objective of an accurate count.

56. The Final Operational Plan reflects the conclusions of various experts including survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

57. The Final Operational Plan states that it "reflects and supports evidence-based decision-making" about the operations necessary to gather and process census responses from every household in the country.

58. The Final Operational Plan states that it was "informed through research, testing, and analysis conducted from 2012 through 2018."

59. The Bureau conducted at least fifteen tests between 2012 and December 31, 2018, when it published its Final Operational Plan.

60. Career Bureau staff developed the Final Operational Plan following substantial consultation with outside experts and census stakeholders, including members of the Census Scientific Advisory Committee and the National Advisory Committee.

61. The Census Bureau also produced a series of "detailed operational plans," which supplement the Final Operational Plan, and provide more parameters for the individual operations that, together, comprise the 2020 Census.

62. The detailed operational plans likewise reflect the conclusions of various subject-matter experts regarding how to complete an accurate count.

63. The Bureau's Final Operational Plan contains several major categories of operations. Two of those categories are particularly important for purposes of this lawsuit: data-collection and data-processing.

64. "Data-collection" refers to operations through which the Bureau obtains information from and about all the people living in the United States.

65. "Data-processing" refers to operations through which the Bureau fills in any gaps in the personal information that it collects from people, transforms the resulting data into usable forms, checks those results for accuracy and other aspects of data quality, and publishes those results, among other things.

66. The Bureau must thoroughly, fully, and correctly perform both categories of

operations—collection and processing—to achieve its stated goal of counting everyone once, only once, and in the right place.

A. Census Data Collection

67. During the census, the Bureau attempts both to determine the number of people in the country and their characteristics, such as their race and ethnicity.

68. Although the Census Bureau planned to deploy many methods during the 2020 Census to collect counts and characteristics from households around the country, the Bureau contemplated, in both the Final Operational Plan, and in the supplemental detailed operational plans, that three methods would account for the overwhelming majority of census responses: the "Self-Response" method; the "Update Leave" method; and the "Non-Response Follow Up" method. *See* U.S. Census Bureau, *2020 Census Detailed Operational Plan for: 18. Non-Response Follow Up Operation* (July 15, 2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/NRFU-detailed-operational-plan_v20.pdf.

69. The Self-Response method was the "primary methodology for the 2020 Census." Under this method, heads of households would provide their 2020 Census responses directly to the Census Bureau by mailing back a paper census form, filling out a digital form on the Bureau's online census portal, or calling into telephone hotlines to provide their responses to Bureau employees operating those hotlines.

70. The Update Leave method was the methodology for reaching housing units that could not receive physical mail or did not have verifiable mailing addresses. Under this method, Bureau employees would travel throughout both rural and urban areas, leaving invitations to participate and paper census questionnaires at these housing units, so that the people living in those locations could respond themselves.

71. The Self-Response method and the Update Leave method are crucial for obtaining accurate information about the number of people in the country and their characteristics, because data people report about themselves and the members of their housing units is the highest quality data that the census collects.

72. But for the tens of millions of households that do not report their personal data through the Self-Response or Update Leave method, the Bureau's next-best source of personal data is data it collects directly from people through the Non-Response Follow Up method.

73. As part of the Non-Response Follow Up method, the Bureau sends its employee enumerators directly to housing units so that they can attempt to speak with a person occupying each unit and obtain information about everyone who should be counted in that unit.

74. The Bureau requires enumerators to record their responses for each household through iPhones that the Bureau specifically contracted and customized for this purpose. The enumerators' iPhones include software designed to lead enumerators consistently and reliably to solicit information from people at their doors. The enumerators' iPhones also include software to ensure that any data collected from housing units remains confidential as it is being transmitted to the Bureau. The limited supply of these customized iPhones places a limit on the number of enumerators that the Bureau can deploy in the field.

75. The Bureau's Detailed Operational Plan for Non-Response Follow Up, which supplements the Final Operational Plan, sets out a specific protocol for conducting Non-Response Follow Up.

76. Under the Detailed Operational Plan, each housing unit assigned for a visit from an enumerator was eligible for up to six "contact days." A "contact day" could include more than one attempted contact per day.

77. The Bureau concluded it could pursue less than six contact days only under certain scenarios.

78. One scenario that would allow the Bureau to pursue fewer than six contact days was the existence of high-quality administrative records for the housing unit. The Census Bureau has collected data from federal administrative agencies, such as the Social Security Administration, the Internal Revenue Service, and the Department of Housing and Urban Renewal, among others, as well as data from states, which it uses to provide information about the count and characteristics of non-responsive households.

79. If the Bureau had located administrative data from federal and/or state

administrative records and concluded that those records contained accurate demographic data for the occupants of a housing unit, the Bureau's enumerators would attempt only one contact with that unit. If—during that contact attempt—the enumerator did not succeed in finding a live person at the unit, then the Bureau would use the information in the administrative records to fill in the census responses for that unit during the data-processing phase of the 2020 Census.

80. A second scenario that would allow the Bureau to pursue less than six contact days would arise if the Bureau identified a proxy—a person such as a neighbor or landlord that the enumerator could ask for information about the occupants of the housing unit in question. After a third failed contact attempt, a unit would become eligible for being counted through proxy.

81. Proxies can produce many types of data. For instance, proxies are useful for helping the Bureau identify whether a housing unit is vacant—and thus should be marked "vacant" in the Master Address File that the Bureau uses to keep track of the overwhelming majority of housing units that it must enumerate—or non-existent—and thus should be deleted from the Master Address File. For the 2020 Census, the Bureau is planning to use administrative records, such as the United States Postal Service's directory of non-deliverable addresses, to identify vacant housing, but proxies are generally more accurate for this purpose. Finally, proxies provide vital data for other operations that the Bureau undertakes during its data-processing phase, described further below.

82. If the Bureau is unable to enumerate a household after six contact days, in most cases, it will resort to less accurate methods for determining the count and characteristics of the household during its data-processing phase, described below.

83. The Bureau performs several other vital operations in addition to door-knocking during the Non-Response Follow Up period, including a series of operations to ensure the quality of the data that it collects in the field.

84. During the Non-Response Follow Up process, the Bureau: follows up with people who self-responded to the census online but did not enter their unique census identification number to ensure that they are counted in the right place (a process known as "Field

Verification"); and corrects information reported erroneously or omitted from previously submitted census forms (a process known as "Coverage Improvement").

85. In addition, the Bureau re-collects census responses in select instances to ensure that the original submissions were accurate (a process known as "Self-Response Quality Assurance"). This operation protects against enumerators falsifying the information that they provide to the Bureau. Specifically, the Bureau conducts quality control reinterviews of a sample of households. This component is designed to deter and detect cases where enumerators have provided false information about the housing units they are assigned to canvass.

86. Quality control reinterviews are part of a broader set of protocols that the Bureau has developed to guard against factors that endanger the accuracy of the count. Non-Response Follow Up is thus important not only for collecting information, but also for ensuring that the information that is collected is accurate. These two components—gathering data and ensuring its accuracy—must both occur for the Bureau to get a fair and accurate count.

87. The Bureau anticipated that approximately 60% of housing units nationally would respond to the 2020 Census through Self-Response and Update Leave, potentially making up to 40% of housing units targets for Non-Response Follow Up.

88. A Non-Response Follow Up universe of 40% of the housing units in the country would have been the largest follow up universe on a percentage basis since at least 1970.

89. The Census Bureau did not anticipate that the Non-Response Follow Up universe in 2020 would mirror the demographic makeup of the nation's population as a whole.

90. Instead, the Census Bureau anticipated that the Non-Response Follow Up universe in 2020 would contain a disproportionate number of people who belong to communities that the Bureau calls "hard-to-count."

91. The Final Operational Plan describes hard-to-count populations as including, but not limited to, the following populations: young children; highly mobile persons; racial and ethnic minorities; non-English speakers; low-income persons; persons experiencing homelessness; undocumented immigrants; persons who have distrust in the government; lesbian, gay, bisexual, transgender, and questioning/queer (LGBTQ) persons; persons with mental and

physical disabilities; and persons who do not live in traditional housing.

92. Historically, these populations have had low self-response rates and have, thus, made up disproportionate shares of households that must receive contact days during Non-Response Follow Up.

93. Consequently, the Final Operational Plan acknowledges, "[t]he NRFU Operation is entirely about hard-to-count populations."

94. The Final Operational Plan also acknowledges that hard-to-count populations may require more outreach than the Non-Response Follow Up method would normally provide, and the Bureau designed its Final Operational Plan accordingly.

95. The Final Operational Plan states that "[w]hile most cases receive a maximum of six attempts, cases in hard-to-count areas may receive more than six attempts to achieve a consistent response rate for all geographic areas."

96. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

B. Census Data-Processing

97. After collection activities are complete, the Census Bureau must process the data.

98. Census data-processing cannot begin until census data-collection concludes.

99. Census data is unusable for its intended purposes until it has been processed.

100. The Census Bureau's data-processing operations transform tens of millions of census responses into usable products, including the population totals used to reapportion seats in the U.S. House of Representatives and to create electoral districts.

101. The Bureau uses its data-processing operations to, among other things, ensure that data received from different data-collection methods are all in a single format allowing them to be processed together.

102. The Bureau uses its data-processing operations to "unduplicate responses"—

meaning to resolve conflicts of information among multiple forms attributable to the same housing unit.

103. The Bureau uses its data-processing operations to determine the final status of a housing unit—such as vacant or inhabited—and determine the total number of people that should be attributed to any apparently inhabited unit that was not counted through Self-Response, Update Leave, or Non-Response Follow Up.

104. The Bureau also uses its data-processing operations to ensure that Bureau data products accurately report respondents' characteristics, such as age, race, and ethnicity.

105. The Bureau uses administrative records and statistical imputation during the data-processing phase to fill in both missing people and their characteristics. But administrative records—especially low-quality administrative records—and statistical imputation are generally less accurate than self-response data.

106. For many households, administrative data provides only low quality information, replete with inaccuracies and incomplete information. This is especially the case for particular communities that are underrepresented in administrative records, including communities of color, immigrants, and low-income families. Use of this low-quality data to fill in missing information for non-responsive households produces less accurate information.

107. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household. Imputation thus assumes the existence of other data points gathered through other data-collection methods—such as self-response, proxies, and administrative records—and generates more accurate results when it can be triangulated against those data points. The processes that the Bureau uses to collect and process self-response data, proxy data, and administrative records are thus critical and inextricably linked to the Bureau's ability to impute data accurately.

108. At various phases of the Bureau's data-processing operations, Census Bureau personnel must review the quality of files in-process before those files can be sent to the subsequent steps in the data-processing operation. These reviews include personnel with subject-matter expertise from several different divisions of the Bureau.

109. The Bureau's data-processing operations help ensure that people are not missed, that other people are not counted multiple times, and that people's characteristics are accurately reported. These processes help eliminate or reduce undercounts, among other kinds of data-quality issues.

C. The Final Operational Plan's Original Timeline for the 2020 Census

110. The Bureau's Final Operational Plan called for data-collection to run from January 21, 2020, to July 31, 2020, for a total of more than six months.

111. In that window, the Self Response method was scheduled to run from March 12, 2020 to July 31, 2020, and the Update Leave method was scheduled for March 15, 2020 to April 17, 2020.

112. The Bureau also scheduled several special operations to occur early in its census taking process. The Service-Based Enumeration, which counts people experiencing homelessness, was scheduled for March 30, 2020 to April 1, 2020, and Group Quarters Enumeration, which counts people living in group housing such as nursing homes, was scheduled from April 2, 2020 to June 5, 2020.

113. The Bureau scheduled the Non-Response Follow Up method to run from May 13, 2020 to July 31, 2020, for a total of approximately eleven and a half weeks.

114. The Bureau scheduled up to five months—from July 31, 2020 to December 31, 2020—to process census data for the congressional reapportionment report.

115. The Bureau also scheduled an additional three months—from January 1, 2021 to March 30, 2021—to process census data for redistricting.

116. The Bureau's timelines for implementing the Final Operational Plan reflect the Bureau's scientifically informed understanding of the time necessary to complete its operations and generate an accurate count.

III. The Census Bureau's COVID-19 Plan.

A. COVID-19 Disrupts the 2020 Census

117. On January 21, 2020, the Bureau began 2020 Census data-collection in remote Alaska.

118. On March 10, 2020, the Bureau began to accept self-responses on its website.

119. Shortly thereafter, many parts of the nation rapidly began to shut down due to the COVID-19 pandemic.

120. The Census Bureau quickly concluded that it could not continue to engage in operations safely. On March 18, 2020, the Bureau announced that it would suspend all field operations for two weeks in order to "help protect the health and safety of the American public." Press Release, U.S. Census Bureau, *U.S. Census Bureau Director Steven Dillingham on Operational Updates* (Mar. 18, 2020), https://www.census.gov/newsroom/press-releases/2020/operational-update.html.

121. On March 28, 2020, the Bureau announced yet another two-week suspension until April 15, 2020, as the coronavirus pandemic made it impossible to engage in operations.

122. The suspension disrupted several field operations, including Update/Leave method, the Service Based Enumeration counting people experiencing homelessness, and the Group Quarters Enumeration counting people living in group housing.

123. In addition, the Bureau halted all hiring and training of the hundreds of thousands of enumerators it needs to conduct Non-Response Follow Up. This included halting any and all background checks and fingerprinting of enumerators that were conditionally hired at that time.

124. The Bureau also decreased office staff at regional centers responsible for processing mail-in self-response forms and at the Bureau's call centers.

B. Changes to the Final Operational Plan in the COVID-19 Plan

125. On April 13, 2020, the Bureau issued an adjustment to its Final Operational Plan to account for the long-term impact of the COVID-19 pandemic. The new plan included a shifted timeline for data-collection and data-processing operations that corresponded with the delays in operations that the pandemic has caused (the "COVID-19 Plan").

126. Adjustments to plans approved by the Office of Management and Budget under the Paperwork Reduction Act must be re-submitted for approval. 44 U.S.C. § 3507(h)(3). The Census Bureau submitted the COVID-19 Plan to the Office of Management and Budget on April 30, 2020. The changes were approved on May 11, 2020.

127. The COVID-19 Plan was designed to "[e]nsure a complete and accurate count of all communities," "[p]rotect the health and safety of the American public and Census Bureau employees," and "[i]mplement guidance from federal, state, and local authorities regarding COVID-19." Press Release, U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19 Fact Sheet* (Apr. 27, 2020).

128. The COVID-19 Plan reflected the conclusions of various experts for how best to proceed with completing an accurate count during the current pandemic. These experts include survey methodologists, statisticians, demographers, geographers, linguists, and mathematicians.

129. Under the COVID-19 Plan, the Bureau suspended 2020 Census field operations for several months, including those operations that were designed to ensure a full count of traditionally undercounted communities.

130. The COVID-19 Plan provided that the Bureau would start the nationwide Non-Response Follow Up operation on August 11, 2020, and continue the door-knocking process through October 31, 2020.

131. Thus, the COVID-19 Plan delayed the start of most door-knocking by three months while maintaining the same amount of time spent undertaking the process—approximately eleven and a half weeks—as the Final Operational Plan had required.

132. Under the COVID-19 Plan, the Bureau also delayed the start of other operations that enumerate traditionally undercounted populations, including the enumeration of the country's homeless population, which the Bureau shifted from March 30, 2020 to September 22, 2020.

133. And the COVID-19 Plan permitted households to submit self-response data to the Bureau until October 31, 2020, extending the deadline under which private persons were able to submit their responses to be counted by more than one month.

134. The Bureau also granted itself one additional month to process data under its COVID-19 Plan, extending the data-processing leg of its operations to nine months given the pandemic. Under this plan, the Bureau would have up to six months to process the data for the apportionment count (between October 31, 2020 and April 30, 2021) and three months to process

the data for redistricting (between April 30, 2021 and July 31, 2021).

135. The Bureau's timelines for implementing the COVID-19 Plan reflect a scientifically informed understanding of the time necessary to appropriately and fully complete its operations and generate an accurate count.

C. Expert and Stakeholder Response to the COVID-19 Plan

136. The Census Bureau solicited feedback on the COVID-19 Plan from relevant area experts and interested stakeholders, including state and local governments and national and community-based non-profit partners.

137. For instance, four former Census Bureau Directors—who served under both Democratic and Republican administrations—issued a statement saying that they had "discussed these operational and schedule adjustments with senior career leadership at the Census Bureau." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

138. These four former Census Bureau Directors further asserted: "Based on (1) our extensive experience in planning, executing, and often adjusting operations of previous decennial censuses, and (2) our firm conclusion that the extension of the field operations reflect careful analysis by the technical, scientific, and operational staff at the Census Bureau, we support the decision and urge Congress to act in concert with it." Press Release, Vincent Barabba et al., *Statement by Former U.S. Census Bureau Directors* (Apr. 14, 2020), https://www.documentcloud.org/documents/6838166-Statement-by-Former-Census-Bureau-Directors-04.html.

139. Prominent civil-rights groups endorsed the COVID-19 Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that her organization "support[ed] the Census Bureau's updated timeline." Press Release, Leadership Conference Education Fund, *Census Timeline Must Protect Health, Ensure Fair Count* (Apr. 13, 2020), https://civilrights.org/edfund/2020/04/13/census-timeline-must-protect-health-ensure-fair-count/.

D. Implementation of the COVID-19 Plan

140. When announcing the COVID-19 Plan, Secretary Ross and Director Dillingham issued a statement indicating that the Bureau requested that Congress extend by 120 days the December 31, 2020 statutory deadline for reporting the state-population totals to the President for purposes of calculating the state apportionments, and extend by 120 days the March 30, 2021 statutory deadline for delivering redistricting data to the states.

141. That same day, President Trump suggested this request was unnecessary, stating:

142. "I don't know that you even have to ask them. This is called an act of God. This is called a situation that has to be. They have to give in. I think 120 days isn't nearly enough." Hansi Lo Wang, *Trump Officials Ask to Delay Census Data for Voting Districts, House Seats*, NPR (Apr. 13, 2020), https://www.npr.org/2020/04/13/833546675/trump-officials-ask-to-delay-census-data-for-voting-districts-house-seats.

143. Indeed, the Census Bureau did not wait for Congress to act before beginning implementation of the COVID-19 Plan. And the Bureau continued implementation of the COVID-19 Plan for over three months through the end of July 2020.

144. For instance, the Census Bureau field operations remained suspended through May 2020.

145. The Bureau only began re-opening a few limited operations, such as the Update Leave method, on a phased basis through mid-June 2020, over two months after the operation was originally planned to occur in the Final Operational Plan.

146. The Bureau did not undertake any Non-Response Follow Up operations in most of the country between May 13, 2020 and July 31, 2020, the timeframe originally set out in the Final Operational Plan.

147. Instead, while the Bureau "soft-launched" door-knocking in select regions of the country in mid-July 2020, the COVID-19 Plan did not call for door-knocking across the country until August 11, 2020, at the earliest.

148. The Bureau ultimately opened six area census offices for Non-Response Follow Up on July 16, 2020, six more on July 23, 2020, thirty-five on July 30, 2020, and forty additional

offices on August 6, 2020.

149. The remaining 161 stateside offices remained unopened until August 9, 2020, including offices in many states and localities with relatively low response rates such as the entire southeastern United States, Texas, New Mexico, Arizona, and Southern California.

150. All along the Bureau continually communicated to the public, and to important local partners, including local governments and national and community based non-profit organizations, that self-responses would be accepted until October 31, 2020, and that Non-Response Follow Up would continue until at least that date.

151. Census partners, stakeholders, and state and local governments relied on the new deadlines set forth in the COVID-19 Plan to redirect their outreach efforts.

152. For example, Plaintiffs Urban League and BAJI, publicized the October 31, 2020 deadline, letting their constituents, members and local organizations know that households had until that time to self-respond. Urban League representatives informed coalition partners participating in the Black Census Roundtable of the new deadlines, and spoke of the deadlines on webinars and other public events. Officials at BAJI publicized the deadlines at public events, including webinars in July 2020, and as part of the organization's social media campaign.

153. Similarly, officials in City of Los Angeles, Harris County, King County, City of San Jose, and City of Salinas, publicized the new deadline while conducting 2020 Census outreach efforts.

154. These public education efforts were significant because they were directed at the general public and at local non-profits that do not primarily work on census issues. The latter often rely on information about the census provided by Plaintiff national non-profits and local governments when communicating with their constituents. Plaintiffs, by disseminating the October 31, 2020 deadline for nearly three months to the public, were largely successful in spreading the understanding that communities had until at least that time to complete the count.

155. For example, the City of Los Angeles announced this date on its own social media platforms and in a social media toolkit that it developed for partner organizations. Los Angeles is deeply concerned that residents have already received information about the October 31, 2020

self-response date and, as a result, will fail to respond before the newly shortened deadline, especially given the Bureau's own minimal efforts at explanation and outreach around the new deadline.

156. Finally, the level of self-response during the 2020 Census, and the ongoing COVID-19 pandemic, provided further evidence for the necessity of continued implementation of the COVID-19 Plan.

157. Under its Final Operational Plan, for example, the Census Bureau had planned to spend eleven and a half weeks canvassing a Non-Response Follow Up universe comprised of 39.5% of households nationally.

158. As of August 9, 2020, the first date of nationwide Non-Response Follow Up, the national self-response rate was 63.2%, meaning that nearly 37% of households nationwide had not yet responded to the census.

159. Several cities with large percentages of traditionally undercounted populations, have even lower response rates. For instance, as of August 14, 2020, the response rate in the City of Detroit was 48.9%, Miami was 49.9%, Philadelphia was 52.3%, Los Angeles was 53.8%, Houston was 54.4%, and New York City was 55.6%.

160. The United States had 24,156 new coronavirus cases on April 13, 2020, the day the Bureau announced its COVID-19 Plan. On August 3, 2020, the United States had approximately 50,000 new coronavirus cases.

161. With COVID-19 limiting the willingness of people to apply for enumerator positions, the areas where the Bureau can safely send enumerators to knock on doors, and the willingness of the public to interact with enumerators, the Non-Response Follow Up operation continues to face far more complications than the Final Operational Plan anticipated.

162. Given these conditions of low response rates and increased coronavirus spread, the Bureau can reasonably expect that it will need to engage in a Non-Response Follow Up operation at least as comprehensive and time-consuming as the operation laid out in the Final Operational Plan.

163. Due to significant delays in operations resulting from the implementation of the

COVID-19 Plan, the Bureau itself has recognized that it would be impossible to produce fair and accurate apportionment numbers to the President by December 31, 2020.

164. On May 27, 2020, Tim Olson, head of field operations for the 2020 Census, stated during a May 26, 2020 webinar organized by the National Congress of American Indians that, "[w]e have passed the point where we could even meet the current legislative requirement of December 31st. We can't do that anymore." Nat'l Conf. of Am. Indians, *2020 Census Webinar: American Indian/Alaska Native*, YouTube (May 26, 2020), https://www.youtube.com/watch?v=F6IyJMtDDgY&feature=youtu.be&t=4689.

165. On July 8, 2020, Al Fontenot, Jr., Associate Director for Decennial Census Programs and a top Census Bureau official, affirmed that the Bureau is "past the window of being able to get" accurate counts to the President by December 31, 2020. U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

IV. The Census Bureau's New Rush Plan.

A. The Announcement of the Rush Plan

166. On August 3, 2020, at the behest of the Secretary of Commerce, Director Dillingham abruptly and without explanation abandoned the COVID-19 Plan and announced the Rush Plan.

167. The Rush Plan drastically shortens the timelines for multiple operations set out in the COVID-19 Plan.

168. The Rush Plan took the form of a short press release on the Census Bureau's website. The press release included a statement from Director Dillingham, which did not provide an explanation for Defendants' decision to suddenly abandon the COVID-19 Plan that the Bureau had adopted and implemented for approximately three and a half months. Nor did it provide any specifics as to why the Bureau no longer believed the timelines called for in the COVID-19 Plan were necessary to ensure an accurate count.

169. The statement noted that the Bureau was taking this action at the direction of the

Secretary of Commerce. But the Secretary made no statement explaining his reason for giving this directive.

170. The Director's statement was largely silent on specific adjustments the Bureau would need to make in order to reengineer its field operations to meet its new, artificially compressed schedule. The statement included proposals for enumerator "awards" and maximizing enumerators' phone and tablet usage, but it did not provide any details about adjustments to the detailed operations provided in the Final Operational Plan.

171. The only adjustments announced under the Rush Plan were severely truncated timelines for conducting data-collection and data-processing operations.

172. Under the Rush Plan, data-collection is now set to end on September 30, 2020, one month earlier than contemplated in the Bureau's COVID-19 Plan.

173. While the Bureau's pre-COVID-19 Final Operational Plan provided 79 days for the nationwide door-knocking stage of the census, and the COVID-19 Plan provided 81 days, the Rush Plan provides just 52 days of nationwide door-knocking.

174. The Rush Plan also cuts post-collection data processing for the apportionment report from up to 6 months as provided in the COVID-19 Plan, and up to 5 months as originally provided in the Final Operational Plan, to less than 3 months.

175. The Rush Plan also shortened the time under which households can self-respond, providing that self-responses delivered after September 30, 2020—which previously would have been timely under the October 31, 2020 deadline—will no longer be counted.

176. While the Rush Plan requires the Bureau to accelerate its operations to complete the 2020 Census by the same deadline contemplated in the Final Operational Plan, it ignores the multiple-month pause in operations, beginning in mid-March 2020, caused by the initial outbreak of COVID-19 in the United States.

177. The decision to rescind the COVID-19 Plan and adopt the Rush Plan was announced without consultation with important stakeholders.

178. As noted above, as late as July 8, 2020, senior Bureau officials were still confirming that it was impossible to complete an accurate count by December 31, 2020.

179. In addition, until July 30, 2020, just four days before the Bureau announced its decision to abandon the COVID-19 Plan, the Bureau was informing respondents on its website that it would engage in Non-Response Follow-Up until October 31, 2020 and that non-responsive households would have until that date to self-respond. Those references were deleted from the website on or about July 31, 2020 and were replaced with the shortened timeframe after the August 3, 2020 announcement.

180. An official at the Government Accountability Office confirmed that Bureau officials told his office that they were given "hours rather than days or weeks" to adjust their plans to finish counting by September 2020. Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

181. While the Census Bureau's decisions, even during the COVID-19 emergency, have often involved consultations with scientific advisory committees, the Committee on National Statistics in the National Academies of Science, other external experts and local government officials, and the thousands of organizations partnering with the Bureau to conduct crucial outreach to historically undercounted communities, no such consultation was made before the Bureau announced its abandonment of the COVID-19 Plan.

182. Census stakeholders immediately denounced the Rush Plan, including stakeholders who had endorsed the COVID-19 Plan.

183. The same four former Census Bureau Directors who endorsed the COVID-19 Plan issued a statement saying that "our expert opinion is that failing to extend the deadlines to April 30, 2021 will result in seriously incomplete enumerations in many areas across our country." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

184. These four former Census Bureau Directors further asserted: "The Census Bureau

will not be able to carry out the NRFU fully and will be forced to take steps such as fewer in-person visits and rely instead on the use of administrative records or statistical techniques on a much larger scale tha[n] in previous census. The end result will be under-representation of those persons that NRFU was expected to reach and, at even greater rates for traditionally hard-to-count populations and over-representation of all other populations with potentially extreme differential undercounts." Press Release, Former Census Bureau Directors, *On the Importance of Extending the 2020 Census Statutory Deadlines to Achieve a Fair and Accurate Enumeration of the United States* (Aug. 4, 2020), https://www.documentcloud.org/documents/7013550-Aug-4-2020-Statement-By-Former-U-S-Census-Bureau.html.

185. The President of the American Statistical Association, the world's largest professional organization of statisticians, issued a statement saying "[t]here is no scientific rationale to curtail the data-collection period for this constitutionally mandated activity, and the premature cessation of census enumeration will produce flawed counts." Letter from Rob Santos, President of the American Statistical Association, to Mitch McConnell, U.S. Senate Majority Leader (Apr. 5, 2020), https://www.amstat.org/asa/files/pdfs/POL-CensusSenateAugust.pdf.

186. Nearly 450 nonpartisan philanthropic organizations who "rely on accurate census data to help identify community needs and to prioritize grantmaking" issued a letter to Secretary Ross and Director Dillingham urging the Bureau to revert to its COVID-19 Plan. Letter from U.S. Philanthropy Leaders to Wilbur Ross, Secretary of the U.S. Dep't of Commerce (Aug. 5, 2020), https://funderscommittee.org/wp-content/uploads/2020/08/Letter-Philanthropic-Leaders-on-Census-Being-Cut-Short-8-5.pdf.

187. Prominent civil-rights groups condemned the Rush Plan. Vanita Gupta, President and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, stated that "[c]urtailing operations is an obvious ploy to guarantee the Census Bureau won't be able to finish counting millions of people—especially those hit hardest by the pandemic." Press Release, Leadership Conference on Civil and Human Rights, *Trump Plans to Sabotage 2020 Census by Cutting Short Operations* (July 31, 2020),

https://civilrights.org/2020/07/31/trump-plans-to-sabotage-2020-census-by-cutting-short-operations/.

188. And the Census Bureau's own field workers have confirmed the impossibility of this new timeline, explaining that the Rush Plan means that it will not be an accurate count for the next 10 years.

B. The Rush Plan Fails to Appropriately Account for Key Factors Affecting the 2020 Census

189. The Rush Plan fails to account for several important factors that affect the 2020 Census Non-Response Follow Up operation.

190. *First*, the Rush Plan does not adequately account for the large number of households in the Non-Response Follow Up universe.

191. Under the Rush Plan, the Census Bureau must attempt to count approximately the same number of households during Non-Response Follow Up as it anticipated counting in its pre-COVID-19 Final Operational Plan, but the Bureau will have four weeks less than provided in that plan to complete the operation. In other words, the Bureau must now try to complete the same amount of work in just 65% of the time it had originally scheduled to complete that work.

192. Over 37% of households nationwide are non-responsive, and several states have even higher percentages of households in the Non-Response Follow Up universe, including New Mexico (46.1%), South Carolina (42.4%), Texas (41.3%), and Georgia (40.8%).

193. While soft-launches of Non-Response Follow Up began in select locations in mid-July 2020, the operation did not begin in any of these states, with large amounts of non-responsive households, until August 9, 2020.

194. Within states, and in particular cities and localities, there are even higher Non-Response Follow Up workloads. For instance, in Plaintiff Harris County, enumerators must still visit over 41% of households. In the City of Los Angeles, over 46% of households remain to be enumerated. The self-response rate in Los Angeles is approximately 14 percentage points below the final self-response rate the City attained during the 2010 Census. Counting in these jurisdictions also did not begin until August 9, 2020.

195. Moreover, given the time constraints placed by the Rush Plan, counting will need to be conducted while these jurisdictions, in many places, struggle to control a surge in COVID-19 cases.

196. While the Bureau announced on August 11, 2020 that it is now "training census takers to follow up with households by phone" in light of the pandemic, that change in Non-Response Follow Up operations was not anticipated in the Final Operational Plan. Press Release, U.S. Census Bureau, *Door-to-Door Visits Begin Nationwide for 2020 Census* (Aug. 11, 2020), https://www.census.gov/newsroom/press-releases/2020/door-to-door-visits-begin-nationwide.html.

197. Given the traditionally low response rates for phone surveys in the wireless era, following up by phone is unlikely to materially increase response rates.

198. A recent Census Bureau survey running in parallel with the 2020 Census demonstrates the difficulty in obtaining responses via phone or email. This spring, the Bureau began conducting a "Household Pulse Survey" to measure household experiences under the COVID-19 pandemic. This survey solicited participation through emails and text messages. Over the first twelve weeks of this survey, response rates were meager, ranging from 1.3% to 3.8%.

199. *Second*, the Rush Plan does not account for the staffing challenges that the Bureau is currently experiencing, many of which are directly related to the ongoing pandemic.

200. As demonstrated in the soft-launch of Non-Response Follow Up in select locales, the Bureau is already experiencing staffing shortages and retention problems with enumerators.

201. In the midst of the ongoing pandemic, prospective enumerators, many of whom are elderly and at high risk of contracting a severe COVID-19 related illness, are less willing to engage in the required door-to-door canvassing.

202. Indeed, Tim Olson, head of field operations for the 2020 Census, stated at a July 8, 2020 press briefing that "[a]bout a third of our [enumerator] applicants [are] older persons considered high risk of the virus." U.S. Census Bureau, *Operational Press Briefing – 2020 Census Update* at 21 (July 8, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/news-briefing-program-transcript-july8.pdf.

203. And Deborah Stempowski, the Census Bureau's Assistant Director for Decennial Programs, noted the Bureau's difficulty retaining enumerators in early August 2020, confirming that potential enumerators were "a little hesitant because of the COVID environment." Mike Schneider, *Census Bureau Drop-Outs Complicate Door-Knocking Efforts*, Associated Press (Aug. 8, 2020), https://www.usnews.com/news/us/articles/2020-08-08/census-bureau-drop-outs-complicate-door-knocking-efforts.

204. In testimony before Congress on July 28, 2020, Director Dillingham confirmed that the Bureau believed that "the pandemic is estimated to increase the number of no shows to training sessions, as well as the number of employees who complete training but decline to show up for work." *Id.*

205. According to reports from census-operations staff working in the field, these predictions have come to pass. One census field supervisor working in the mid-Atlantic noted that, given the new rushed timeline and lack of sufficient staff, "[w]e're just sending bodies out regardless of whether they're ready or not." Hansi Lo Wang, *'Not Enough Time': Census Workers Fear Rushing Count Could Botch Results*, NPR (Aug. 11, 2020), https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results.

206. In addition to enumerator low-count and hesitancy, another source of staffing issues involves delays in processing background checks on enumerator applicants and in enumerator onboarding.

207. A June 2020 GAO report on the 2020 Census delays COVID-19 has caused, and the risks the pandemic has exacerbated, noted that the Bureau "will have to quickly hire and onboard sufficient staff to conduct its operations" to reach adequate staffing levels. U.S. Gov't Accountability Office, *COVID-19 Presents Delays and Risks to Census Count* (June 2020), https://www.gao.gov/assets/710/707456.pdf.

208. That same report also noted that, once potential enumerators accept a job offer from the Bureau, the new hires "must wait a minimum of 60 days before they can begin training, a time period during which they must complete fingerprinting and a background check." *Id.*

209. Reports from recently hired enumerators confirm that the Bureau is facing these

technical challenges as well, under the compressed timeline. One recent hire in Boulder, Colorado noted that he lost six potential days of door-knocking because he was unable to complete the Bureau's online training module.

210. Thus, under the Rush Plan, the Bureau will not be able to hire and train sufficient enumerators.

211. Even if it were possible for the Bureau to hire all of the enumerators it will need, the Bureau would also need time and funding to obtain additional equipment for any additional enumerators it hires beyond its initial estimates of equipment. For example, the Bureau would need more of the iPhones discussed above that the Bureau specifically contracted and customized for 2020 Census enumerators.

212. With fewer enumerators in the field, in addition to training and equipment issues, the Bureau cannot ensure that non-responsive households receive the requisite number of visits, as contemplated in the Final Operational Plan.

213. While the Bureau had a $2 billion contingency fund prior to the existence of the COVID-19 pandemic, it has already used $1.5 billion of that fund addressing pandemic-related issues. The remaining $500 million will be needed to further respond to the pandemic, and, in any event, is nowhere near the $1 billion that the administration claims that the Bureau would need to conduct adequate Non-Response Follow Up operations under the Rush Plan.

214. Thus, instead of providing additional enumerators, the Bureau's Rush Plan will likely result in a smaller number of enumerators shouldering larger-than-planned workloads. Increasing workloads for enumerators over a short period of time can result in errors and inaccuracies in counting but it cannot make up for the time lost to the Rush Plan.

215. *Third*, the Rush Plan fails to account for factors relevant to efficient enumeration, such as the time when enumerators visit households.

216. For instance, under the Final Operational Plan, enumerators visit households at specific times of day and on specific days of the week, depending on when residents are likely to answer.

217. Under the Rush Plan, enumerators will be under pressure to complete their work

in a tightly constrained timeframe. As a result, ensuring that non-responsive households receive the requisite number of enumerator visits at the most opportune times for enumeration may become exceedingly difficult, if not impossible. Instead, the Rush Plan increases the likelihood that households will either receive visits at less opportune times, or simply receive fewer visits altogether.

218. *Fourth*, the Rush Plan fails to account for the additional crucial operations that enumerators must conduct, as contemplated in the Bureau's final plans for the 2020 Census. Apart from visiting households upwards of six times, enumerators also engage in a host of additional quality control activities.

219. As noted above, enumerators are expected to visit the households of persons that self-responded to the census online but did not enter the unique identifier provided on census mailers. This "non-ID processing" is necessary to verify the address information provided by respondents. While this process only requires a single visit to a household, it nevertheless must be completed in the compressed timeline provided for under the Rush Plan.

220. Similarly, the Bureau must conduct quality control reinterviews of a sample of households during Non-Response Follow Up. This operation is designed to deter and detect enumerator falsification. Detecting such falsifications will be especially important under the Rush Plan where individual enumerators must shoulder a heavier workload. The use of enumerators to conduct these reinterviews will, under the Rush Plan, place additional strain on the Bureau's already stretched labor resources.

221. Cutting any one of these functions will cause errors and inaccuracies to affect the final 2020 Census data. By reversing the COVID-19 Plan and shortening the timeframe for conducting Non-Response Follow Up by a month, the Bureau will likely need to make cuts to one or more of these operations.

222. By reducing the amount of time and resources necessary to perform the kinds of quality-control measures that the Bureau originally planned for Non-Response Follow Up, the Rush Plan actively dismantles processes that the Bureau has specifically developed over the course of time as checks against falsified census responses. The Rush Plan thus threatens census

accuracy not only by reducing the Bureau's time to *collect* data, but also by reducing the Bureau's time to ensure that the data it has collected has been collected *properly* and *truthfully*.

223. *Fifth*, the Rush Plan fails to account for the other field operations enumerators will need to conduct at the same time as they attempt to speed through door-knocking operations.

224. Under the Final Operational Plan, the Bureau planned to finish specialized operations for counting people experiencing homelessness, and people living in group housing in April 2020, before engaging in nationwide door-knocking. After suspending operations due to COVID-19, the Bureau moved these operations to September 2020, well-before the October 31, 2020 deadline the Bureau set for completing the Non-Response Follow Up operation.

225. The new Rush Plan requires the Bureau to conduct these specialized operations at the same time as it is scrambling to complete Non-Response Follow Up. This will further stretch the Bureau's limited resources and increase the likelihood of missing information.

C. The Rush Plan Also Fails to Appropriately Account for Factors that Will Affect Post-Collection Data Processing

226. The Rush Plan fails to account for the additional strain on data-processing operations resulting from the consequences of the COVID-19 pandemic.

227. Following the outbreak of COVID-19 in the United States in mid-March 2020, colleges and universities across the country closed, and students moved out of campus and off-campus housing. Similarly, many residents of cities, especially those living in COVID-19 hotspots, moved to locations where the virus was less prevalent. In a recent study, three percent of people surveyed reported that they had moved permanently or temporarily as a result of the pandemic.

228. This significant movement of people coincided with Census Day, April 1, 2020, and will lead to confusion about what residence should be listed on responses.

229. It is likely that the Bureau will receive an increased amount of duplicate responses, which will, in turn, require more time and Bureau resources to review and correct.

230. The Rush Plan also fails to account for the Bureau's inability to timely obtain and process all the administrative-records data crucial for completing an accurate count.

231. The Bureau relies principally on Title 26 data—that is, tax returns that individuals file with the Internal Revenue Service ("IRS")—for the administrative records it uses to fill in missing people and their characteristics.

232. Because this year's tax filing deadline was July 15, 2020, and the IRS generally requires three months to transfer Title 26 data to the Census Bureau, the Bureau will not possess all the Title 26 data it is planning to use until mid-October 2020, at the earliest. Once the Bureau has possession of that Title 26 data, it will have to undertake a time-consuming round of additional review and processing, further delaying its ability to use the data for its planned purposes. These delays will compel the data-processing phase of 2020 Census operations to proceed more slowly than the Rush Plan contemplates or would allow.

233. Ultimately, the solution to alleviate each of these problems was articulated in the COVID-19 Plan: provide the Bureau's limited number of enumerators with additional time to conduct the data-collection operations necessary to ensure a complete and accurate census, and provide Bureau staff with additional time to conduct the data-processing operations necessary to ensuring the same. The Rush Plan fails to address these issues or explain why the Bureau's prior conclusions were incorrect..

D. The Rush Plan Does Not Account for Federal Statistical Guidelines

234. In replacing the COVID-19 Plan with the Rush Plan, Defendants departed from federal government statistical standards that promote the accuracy of information collected and disseminated by the agencies.

235. The Bureau's failure to follow these standards further emphasizes its inability to conduct an adequate count in the time and under the conditions that the Rush Plan provides.

236. Under the Paperwork Reduction Act, the Office of Management and Budget is responsible for coordinating the federal statistical system, including the development and implementation of "Governmentwide policies, principles, standards, and guidelines" "concerning [] statistical collection procedures and methods." 44 U.S.C. § 3504(e)(3) (A).

237. The Office of Management and Budget is responsible for issuing guidelines that provide "procedural guidance to Federal agencies for ensuring and maximizing the quality,

objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies." Consolidated Appropriations Act, FY 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

238. One such guideline issued by the Office of Management and Budget provides specific standards to agencies like the Census Bureau, in ensuring the quality and utility of federal statistical surveys, such as the decennial census. Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2 (2006).

239. Under these standards, agencies are required to develop "realistic timetable[s]" for surveys. *Id.* § 1.2.

240. The Bureau failed to take this basic requirement into account when it decided to implement the Rush Plan. The Rush Plan compresses the timeline for counting operations despite evidence of staffing shortages and heavier workload. The Plan attempts to accomplish a task—speedy delivery of results by December 31, 2020—that the Bureau has already deemed "impossible."

241. The standards also require agencies, including the Census Bureau, to "[e]ncourage respondents to participate to maximize response rates and improve data quality." Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys § 2.3.2. This standard requires that the Census Bureau "[e]nsure that the data collection period is of adequate and reasonable length."

242. Again, the Rush Plan does not account for this standard. The Final Operational Plan and the COVID-19 Plan provided for over eleven weeks of Non-Response Follow Up, and up to five and six months, respectively, of post-collection data processing for the apportionment report. The Rush Plan, on the other hand, cuts the time allotted for counting by four weeks, without explaining how it will encourage more efficiency in collecting responses than the plan it reversed.

243. The standards also require the Bureau to plan for "an adequate number of contact attempts" to the respondent and to establish protocols for minimizing enumerator falsification, including "reinterviewing respondents." Office of Mgmt. & Budget, Standards and Guidelines

for Statistical Surveys, Directive No. 2, § 2.3.3.

244. With the Rush Plan significantly cutting the time available to conduct Non-Response Follow Up, it is expected that the Bureau will need to cut particular Non-Response Follow Up processes. This includes reducing the number of housing unit visits it earlier deemed necessary to enumerate a non-responsive household, or cutting back on enumerator reinterviews. Either decision will conflict with the Bureau's obligation to abide by federal statistical standards.

E. The Rush Plan Will Produce Low Quality and Inaccurate Data

245. Ultimately, Defendants' decision to rush completion of the 2020 Census will produce a significantly less accurate census than the COVID-19 Plan.

246. By cutting down the time allotted for door-knocking, the Rush Plan will result in fewer contact days by enumerators to non-responsive households, and less data collected by enumerators about those households.

247. The concerns about inaccuracy resulting from shortening time for Non-Response Follow Up are real and verified. A GAO review of the 2010 Non-Response Follow Up operation determined that local census offices with "higher percentages" of "less complete house-hold data" were more likely to have completed their Non-Response Follow Up in 53 days or less as compared to those offices that took a longer period of time. U.S. Gov't Accountability Office, *2010 Census: Data Collection Operations Were Generally Completed as Planned, but Long-Standing Challenges Suggest Need for Fundamental Reforms* (Dec. 2010), https://www.gao.gov/new.items/d11193.pdf.

248. As noted above, after the Bureau exhausts attempts to enumerate households through methods that render more accurate results, such as self-response and enumerator interviews, the Bureau turns to less accurate sources of data and statistical methods as a last resort to fill in missing information.

249. By curtailing Non-Response Follow Up, the Rush Plan will force the Bureau to resort to less accurate methods of data collection, well before the exhaustion of more accurate methods. Consequently, the Rush Plan will lead to the production of lower-quality information.

250. For instance, under the Final Operational Plan, the Bureau would not consider

low-quality administrative data before conducting the requisite number of contact days for a particular type of housing unit. By reducing the number of enumerator contact days, the Rush Plan will lead to reliance on these types of lower-quality data sources prior to exhausting the more accurate methods contemplated in the Final Operational Plan. Consequently, the Rush Plan will lead to more inaccuracies in the data.

251. Based upon past practices, the Bureau may also use whole-count imputation to calculate missing household data but to an extent and in ways not used previously. Imputation involves the Bureau using information from surrounding responsive households to infer the count and characteristics of a non-responsive household.

252. In previous censuses, the Bureau imputed upwards of 2.0% of households left over after exhausting its Non-Response Follow Up efforts. Under the time constraints of the Rush Plan, the Bureau will need to turn to imputation before exhausting its in-person enumeration efforts. One former Census Bureau Director estimates that, under the Rush Plan, the Bureau may end up imputing up to 10% of households.

253. Since data produced through the Bureau's current imputation methods are less accurate than data collected from enumerator interviews, Defendants' decision to rush completion of the 2020 Census will result in significantly less accurate total-population data than would have been produced under the COVID-19 Plan. This decline in accuracy will affect both the census's calculations of the total number of people living in the country and the census's recording of the characteristics of those people, and such inaccurate data will not meet the constitutional minimum for conducting the decennial enumeration or satisfy the "strong constitutional interest in accuracy" of the Census. *Utah v. Evans*, 536 U.S. 452, 478 (2002).

254. The Rush Plan will likely exacerbate the quality problems associated with imputation by compromising the Bureau's ability to collect the other kinds of data—such as self-responses, proxies, and administrative records—that it requires to impute most accurately. As noted above, imputation does not occur in isolation from the Bureau's other data sources, but in concert with them. With less data drawn from these other sources and less accurate data drawn from these other sources, the quality of the Bureau's imputation will decline.

255. The Rush Plan will also disrupt the post-collection data processing operations, described above. As noted by Secretary Ross and Director Dillingham in mid-April 2020, following Non-Response Follow Up the Bureau engages in "lengthy, thorough and scientifically rigorous" data processing, which is essential to ensuring an accurate census.

256. In announcing the new plan to rush the completion of the 2020 Census, Director Dillingham stated that the Bureau would "streamline" these operations in order to meet the December 31, 2020 deadline.

257. While the Director has not specified what this "streamlining" means for post-collection operations, the bottom line is that the Bureau cannot fully engage in the operations as contemplated in its Final Operational Plan on the shortened timeframe. As a result, the Bureau will have to cut or reduce its efforts to review and process collected data to ensure accuracy.

F. The New "Rush" Plan Will Create Confusion that Plaintiffs Will Be Forced to Spend Time and Money Counteracting

258. The new plan to rush completion of the 2020 Census also creates additional confusion about census operations at a critical moment in the census-taking process.

259. The Census Bureau's abrupt change will require groups and local governments engaging in Get Out the Count campaigns, including Plaintiff localities and Plaintiff organizations, to expend resources to correct confusion about the last date for counting in the 2020 Census.

260. As noted above, Plaintiff organizations and localities engaged in extensive public information campaigns that publicized the October 31, 2020 deadline.

261. The Rush Plan requires Plaintiffs to expend additional resources in order to update existing public materials, distribute new materials, and engage in more public-facing efforts to educate the public, their constituents, their members and/or constituents, and local organizations that the self-response period for the census ends on September 30, 2020.

262. For instance, in Harris County, officials ordered a mailing to constituents informing them that they had until October 31, 2020 to respond to the census. That order occurred before the August 3, 2020 decision to implement the Rush Plan. In light of the new

plan, the officials were forced to order stickers to cover the reference to October 31, 2020 on the mailer and to dedicate office staff to spend time affixing those stickers and updating the mailer. Similarly, Plaintiffs the City of Los Angeles, BAJI, and Urban League must update advertisements on social media to correct previous communications that referenced the October 31, 2020 deadline.

263. Apart from correcting misinterpretations arising from earlier statements Plaintiffs made in reliance on the Bureau's COVID-19 Plan, Plaintiffs must now also engage in more, unanticipated outreach to educate the public about the Census Bureau's Rush Plan decision. With one month less of counting, there is now increased urgency for non-responsive households to self-respond. As a result, Plaintiffs are developing new plans to reach more households and encourage more census participation.

G. The New "Rush" Plan Will Lead to Undercounting of Minorities

264. The new plan to rush completion of the 2020 Census will exacerbate undercounting of Black, Latino, and Native American communities.

265. As noted above, Non-Response Follow Up, is specifically designed to ensure that traditionally hard-to-count communities, including Black, Latino, and Native American communities are fully counted. By cutting Non-Response Follow Up short, the administration is disrupting the operation most essential to ensuring an accurate count for these communities.

266. For the 2020 Census, Black, Latino and Native American populations make up a disproportionate share of the population in tracts with the lowest self-response rates in the United States. For instance, as of July 23, 2020, one in five residents living in census tracts with the lowest self-response rates was Black, and one in four was Hispanic, far larger proportions than Black and Hispanic shares of the general population.

267. Consequently, Black, Latino, and Native American households will make up a disproportionate share of the Non-Response Follow Up universe.

268. Given the challenges of the shortened Non-Response Follow Up timeline, Black, Latino, and Native American households have a high likelihood of being missed, or inaccurately enumerated through administrative records and imputation. As noted above, these alternative

methods for enumeration will result in lower quality data for these groups.

269. The problem, however, is even more serious because it replicates and exacerbates problems the Census Bureau has found in prior censuses and has striven to correct in subsequent censuses. Data from previous censuses shows that Black, Latino, and Native Americans have historically been undercounted. Over-reliance on alternative methods of data to enumerate a disproportionate share of the population in these groups will further exacerbate potential undercounting in these groups during the 2020 Census.

270. Accurate data about the size, location, and characteristics of communities of color is necessary to equitably distribute political power through congressional reapportionment and redistricting at the state and local levels, enforce civil-rights laws that affect basic needs like housing and employment, and conduct effective research, including on pressing issues like public health.

271. Truncating Non-Response Follow Up will exacerbate undercounts of communities of color in at least two ways: first, by missing members of those communities entirely; or, second, by recording their characteristics incorrectly, such that the census results will not register them as members of communities of color. In either instance, data regarding communities of color will be inaccurate. This inaccuracy then deprives communities of color of federal funding, all the material support that flows from federal funding, the protections of the law, and political power at the federal, state, and local levels.

H. The New Rush Plan Has No Legitimate Justification

272. In announcing the Rush Plan, Defendants provided no express justification. Defendants stated in passing, however, that reporting of apportionment data to the President by December 31, 2020 is required by statute.

273. But there is "nothing sacred in the due date of the filing [of apportionment data], especially when the work of the Census Bureau . . . is incomplete." *Carey v. Klutznick*, 637 F. 2d 834, 837 (2d Cir. 1980).

274. The Supreme Court thus determined that the government can and should substitute apportionment counts that have already been filed and certified with "newer, more

accurate version[s]." *Utah v. Evans*, 536 U.S. 452, 462 (2002).

275. Defendants have also recognized that, in the event of a conflict between the two, the constitutional requirement of a fair and accurate enumeration, rather than the statutory deadline, is the controlling legal requirement. With the COVID-19 pandemic threatening the health and safety of communities across the country, Defendants adjusted 2020 Census operations in the COVID-19 Plan, shifting the timeline by several months. Defendants did not wait for Congress to act to implement this plan, recognizing that the Plan was necessary to protect enumerators and respondents, and to ensure an accurate count.

276. Because of those delays, as the Bureau itself recognized, it was no longer possible for Defendants to produce data by December 31, 2020 that fulfilled their constitutional and statutory mandate. Specifically, the Bureau could not simultaneously pursue an accurate 2020 Census, and speed through completion of census-taking in order to report numbers to the President by the end of the year.

277. Several senior officials charged with actually conducting the 2020 Census confirmed the impossibility of this task throughout the summer, including approximately four weeks before Defendants' abruptly announced their decision to adopt the Rush Plan.

278. The statutory deadline at issue is not mandated by the Constitution. Taking the modest additional time necessary to ensure an accurate census, should not prevent a timely reapportionment, as elections for congressional seats impacted by reapportionment will not occur until 2022.

279. Ultimately, Defendants cannot sacrifice their mandatory *constitutional* obligation to make decisions reasonably related to producing an accurate count in order to comply with a pro forma *statutory* deadline. Congress clearly could not, for instance, satisfy its constitutional obligations by providing the Census Bureau with a single week in which to conduct the census. Strictly adhering to the December 31, 2020 deadline, as applied in extraordinary circumstances of the ongoing pandemic, would be equally unconstitutional.

I. Implementation of the Apportionment Exclusion Order

280. Defendants have not yet sought to justify their motivation for adopting the Rush

Plan, and it cannot be justified on the basis of artificial statutory deadlines. Instead, the timing of the abandonment suggests that the decision was influenced by a desire to implement the President's Executive Memorandum excluding undocumented immigrants from the apportionment count, thereby undercutting the contribution of communities of color to the calculations for equal representation for purposes of congressional apportionment (the "Apportionment Exclusion Order").

281. In late June 2020, the White House took the unprecedented step of adding two political appointees to Census Bureau staff with unspecified job duties. Neither appointee had an expertise in statistics, and both had a demonstrated history of partisan activity. These unusual appointees had previously engaged with the Census Bureau on questions about changing operations and methodology.

282. In mid-July 2020, White House officials reportedly asked congressional appropriators to include $1 billion in the next coronavirus stimulus bill for the purpose of completing the 2020 Census by the December 31, 2020 deadline.

283. This abrupt change in policy coincided with and was motivated by the President's July 21, 2020 issuance of the unconstitutional Apportionment Exclusion Order declaring that it is the policy of the United States to remove undocumented persons from the apportionment count, and requiring the Secretary of Commerce to produce estimates of the number of undocumented persons in the United States when reporting total population counts to the President. As noted, the Apportionment Exclusion Order is currently being challenged as unconstitutional and unlawful in a number of lawsuits filed in jurisdictions around the country, including in this District.

284. Shortening the census timeline increases the likelihood that, regardless of the outcome of the November 2020 election, this President will have the opportunity to implement his Apportionment Exclusion Order. Delaying reporting until spring—as the COVID-19 Plan issued by the Census Bureau and Department of Commerce previously did—leaves open the possibility that the President will no longer be in office when data is provided, and thus will be unable to effectuate the Apportionment Exclusion Order.

285. Defendants did not justify their sudden, unexplained reversal of position with any evidence that Bureau officials had been wrong in stating, repeatedly, that it would be impossible to produce accurate counts by December 31, 2020. There is also no evidence that the decision to cut short counting operations was driven by the scientifically based judgment of Bureau personnel or external experts.

286. To the extent that Defendants' are motivated by a desire to implement the President's Apportionment Exclusion Order, that motivation is improper. It bears no reasonable relationship to the achievement of a fair and accurate census, and, under the circumstances currently facing the count, implementing the Apportionment Exclusion Order will undermine that goal.

287. Moreover, that Memorandum is just the latest attempt by the President and Secretary Ross to manipulate the census along racial and ethnic lines. Beginning in 2017, Secretary Ross attempted to add an untested citizenship question to the 2020 Census, claiming that the question was necessary to better enforce the Voting Rights Act. In reality, the administration was seeking block-level citizenship data so states could draw district lines in a manner that would disadvantage Black and Latino communities.

288. Defendant Ross's decision was litigated, and enjoined by three district courts. One of those cases ultimately ended up before the Supreme Court. There the Court found that Defendant Ross's stated Voting Rights Act rationale to support the addition of a citizenship question to the 2020 Census was "contrived" and vacated Defendant Ross's decision. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

289. On July 5, 2019, following the Supreme Court's decision, President Trump confirmed the real rationale—and fully justified the Supreme Court's holding that the administration's rationale for this census decision was pretextual—when he stated that the administration sought a citizenship question, not to enforce the Voting Rights Act, but rather "for districting" and "for appropriations." Remarks by President Trump Before Marine One Departure (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

290. Indeed, further evidence that Defendants' actions were pretextual arose from files of a prominent redistricting strategist, Thomas Hofeller. In 2015, Hofeller prepared a study titled "The Use of Citizen Voting Age Population in Redistricting." In the study, Hofeller recommended adding a citizenship question to the census so that states could use citizen voting-age population rather than total population to redistrict. This change in the redistricting base, in Hofeller's words, would be advantageous to "Non-Hispanic Whites" and would undercut the political power of Hispanics.

291. It was later revealed that Hofeller was involved in drafting portions of the memorandum from the Department of Justice to Defendant Commerce seeking addition of a citizenship question on the 2020 Census, including sections relating to the pretextual reason for requesting the question. *See* Ex. 8 to NYIC Pls.' Mot. for Sanctions at 124-31, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. July 16, 2019), ECF No. 635-1; Defs.' Opp. to Letter Mot. to Compel at 3, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-2921-JMF (S.D.N.Y. Oct. 30, 2018), ECF No. 451.

292. Shortly after the Supreme Court's decision, President Trump issued an executive order, demanding executive agencies provide the Census Bureau with administrative records sufficient to allow the Bureau to determine "the number of citizens and noncitizens in the country." Exec. Order No. 13,880, § 1, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019). The Executive Order explicitly states that the reason this data is necessary is to design "legislative districts based on the population of voter-eligible citizens," instead of total population. *Id.* at 33,823-84.

293. In light of that history, the Apportionment Exclusion Order, and the near-contemporaneous decision to cut counting operations short represent yet another attempt by the administration to manipulate the 2020 Census and potentially undercut the political power of communities of color. Defendants cannot rely on this memorandum as justification to support their decision to undermine the accuracy of the census.

V. Harm to Plaintiffs.

294. Plaintiffs and Plaintiff non-profits' members and/or constituents reside in locales

that will suffer harm as a result of Defendants' decision because that decision is very likely to cause these locales to be more disproportionately undercounted in the 2020 Census than they otherwise would have been.

295. On August 9, 2020, at the beginning of the Non-Response Follow Up operation, Plaintiff City of Los Angeles, had a response rate of just 53.1%, which was significantly lower than the 64.5% statewide response rate in California on that same date.

296. The Urban League, League of Women Voters, and BAJI have affiliates, constituents, and members in major cities across the United States. This includes cities where response rates were lower than their corresponding statewide response rates on the first day of Non-Response Follow Up including San Francisco (61.4%) and Monterey (60.5%) as compared to California (64.5%), Miami (49.6%) as compared to Florida (60.1%), Philadelphia (52%) as compared to Pennsylvania (65.5%), Detroit (48.7%) as compared to Michigan (68.9%), and New York City (54.9%) as compared to New York State (58.9%).

297. Plaintiffs Ellis and Garcia are residents of Houston, Texas. The response rate in Houston at the beginning of Non-Response Follow Up was 54%, which was lower than the statewide response rate for Texas on that date, 58.2%.

298. As noted above, Defendants' decision will result in fewer enumerations through Non-Response Follow Up, increased reliance on low-quality administrative data, and increased imputation. Consequently, Defendants' decision will result in cities' with higher rates of non-response (1) having less accurate data; and (2) experiencing higher rates of undercounting.

299. Because these cities have a higher proportion of households in the Non-Response Follow Up universe than their corresponding states, these cities have a substantially higher likelihood of being undercounted because of Defendants' decision than surrounding communities in their states. These disproportionate undercounts will cause Plaintiffs to suffer both fiscal and representational harm.

A. Funding Harms

300. The Rush Plan will result in loss of federal funding for Plaintiffs Harris County, City of Salinas, and the City of Los Angeles and the communities where members of Plaintiff

non-profits reside, including Miami, Detroit, Philadelphia and New York.

301. Over 130 programs and 675 billion dollars are allocated to states and localities on the basis of census-derived information. This includes funding to states for federal transportation planning purposes, education, and healthcare.

302. Many important federal programs, including Title I Grants under the Every Student Succeeds Act, require states to distribute funds to localities on the basis of census-derived information.

303. State Education Agencies must allocate Title I Grants, at least in part, on the number of children aged 5-17 living in poverty in a local education agency's jurisdiction.

304. Given that members of Plaintiff non-profits reside in cities that are likely to be more undercounted under the Rush Plan relative to surrounding communities in their states, including San Francisco, Miami, Detroit, Philadelphia, and New York City, Defendants' decision will likely deprive the communities where these members reside of Title I Grant funding they would have otherwise received. Similarly, Defendants' decision places Plaintiffs Ellis and Garcia's community at higher risk of deprivation of Title I Grant funding.

305. Several additional federal programs require states to use census-derived information to distribute funds directly to cities and counties, based on their share of a relevant population. For instance, the Low Income Home Energy Assistance Program, the Workforce Innovation and Opportunity Act program, and the Community Services Block Grant Program, all require states to distribute funds to cities and counties, at least in part, on the proportion of a state's low-income residents living in those cities and counties. This data is derived from information collected during the decennial census.

306. Both Harris County and the City of Los Angeles receive funds under these programs. Consequently, disproportionate undercounting of Harris County and the City of Los Angeles, as compared to their states, is likely to result in loss of funds under these and similar programs.

307. Several federal funding programs provide funding directly to cities and counties based on census-derived information. For instance, the Community Development Block Grant

program, and the Emergency Solutions Grant, allocate funding to cities and counties based, at least in part, on their share of the overall population count relative to other metropolitan areas.

308. Of cities with over 500,000 people, the City of Los Angeles had the fourth lowest response rate in the country, just behind Detroit and Philadelphia. Consequently, Los Angeles will likely lose Community Development Block Grant funds because of Defendants' decision.

309. Similarly, members of Plaintiff non-profits live in major metropolitan areas with some of the lowest response rates in the country, such as Miami, Detroit and Philadelphia. Defendants' decision will likely deprive these members' communities of funding under the Community Development Block Grant program.

310. Finally, the allocation of federal transportation including the Surface Transportation Block Grant Program, and the Metropolitan and Statewide Nonmetropolitan Transportation Planning Programs are based on the population of urbanized areas in a state compared to those of other states, as determined by the decennial census.

311. Plaintiffs Ellis and Garcia regularly drive on highways and roads in Texas. Disproportionate undercounting of urbanized areas in Texas during the 2020 Census will result in reduced transportation funding for Texas under federal transportation programs.

B. Representational Harm

312. Defendants' decision will also likely result in representational harm to individual Plaintiffs and to the members of Plaintiff organizations.

313. Plaintiffs Ellis and Garcia reside in Houston, Texas. In terms of self-response rates, Texas ranks 39th in the United States. Approximately four million Texas households are in the Non-Response Follow Up universe, which is more households than any state other than California.

314. Consequently, Defendants' decision will not only cause a substantial undercount in Texas, but that undercount will likely be disproportionate as compared to other states. Texas will likely be deprived of its fair share of representation in the next congressional apportionment.

315. As a result, Defendants' decision is likely to result in reduction of voting power and representation for Plaintiffs Ellis and Garcia, because it will likely cause the loss of a seat in

Texas, and will result in fewer Representatives spread out over the state of Texas.

316. As for Plaintiff City of Los Angeles, at least one study has predicted that, were California to lose a congressional seat because of the final census count, that seat is very likely to come from a district that includes portions of South Los Angeles, thus reducing the city's representational delegation.

317. Defendants' decision will also cause Plaintiff Ellis and members of Plaintiff non-profits to experience a loss of intrastate voting power.

318. By causing disproportionate undercounting of communities in Houston, Detroit, Philadelphia, and Miami, as compared to their corresponding states, Defendants' decision will result in drawing of district lines that do not accurately represent the population of the state, and disadvantage Plaintiffs Ellis and Garcia, and members of Plaintiff organizations that live in undercounted communities.

C. Inaccurate Data

319. Plaintiff local governments will suffer harm from the adverse impact Defendants' decision will have the accuracy of population counts produced by the Census Bureau. Plaintiff local governments often rely on accurate information collected by the Census Bureau for crucial public planning purposes, including planning for how to respond to emergencies.

320. For example, local governments often rely on a Social Vulnerability Index to identify communities that are at high risk during a particular emergency. Government officials rely on this index to determine where to allocate resources before and during emergencies. A Social Vulnerability Index use census data to identify specific populations that may be vulnerable to a particular emergency, including data relating to age, housing density, income status, and race and ethnicity. Inaccurate census data would make disaster planning and emergency response more difficult, and could disrupt important public programs.

321. In Harris County, officials used the Center for Disease Control's Social Vulnerability Index to inform decisions about proper distribution of COVID-19 Relief Funds. The funds were allocated to provide relief to Harris County residents most impacted by the global pandemic. That Social Vulnerability Index, which was based on census data, was used to

identify census tracts with the most vulnerable residents, and applications from residents from those tracts were prioritized and given higher chances of acceptance for funds. Without accurate census data, Harris County would struggle to ensure that crucial relief funds were reaching the communities most in need of them.

322. Similarly, King County relies on accurate census data to inform its public-policy decision making. For instance, the county uses census data to plan public-transit service, and to ensure priority populations have transit access, and to site public health clinics.

323. The low-quality data and undercounting that Defendants' decision will cause will also harm Plaintiffs. For instance, undercounting of Black, Latino, Native American, and immigrant communities will negatively affect the Urban League, League of Women Voters and BAJI by undermining these organizations' core missions of promoting equal and just laws and empowering vulnerable communities through building coalitions and initiating campaigns with African Americans and Black immigrants, and fostering racial, economic, and social equality for the communities they serve.

D. Expending Additional Resources

324. Plaintiff organizations, the Urban League, the League of Women Voters, and BAJI, and Plaintiff local governments, City of San Jose, Harris County, King County, City of Salinas, and City of Los Angeles will need to expend additional resources and divert resources from planned programs and projects in order to address the adverse consequences of Defendants' decision to abandon the COVID-19 Plan, and implement the Rush Plan.

325. Plaintiffs' planned efforts to ensure the effective enumeration of historically undercounted communities were based on the understanding that the Census Bureau would implement the Non-Response Follow Up operation contemplated in the Final Operational Plan and adjusted in the COVID-19 Plan.

326. The abrupt reversal of the COVID-19 Plan, and the implementation of curtailed Non-Response Follow Up in the Bureau's Rush Plan will adversely affect Plaintiffs' plans.

327. Plaintiff organizations and local governments will likely need to adjust plans, and divert resources from other planned activities and programs in order to ensure the communities

they serve are adequately counted. Specifically, Plaintiffs will need to recruit and train staff to engage in increased and expanded outreach to potential non-responsive households in order to make up for fewer enumerator visits, or to other aspects of the Non-Response Follow Up program, such as the reinterview process.

328. For instance, Plaintiff BAJI is planning significant adjustments to its 2020 Census outreach plans in light of Defendants' decision, that include diversion of resources from other sources, and significant expenditures. In order to engage in effective outreach, BAJI needs organizing staff dedicated to civic engagement. With Non-Response Follow Up occurring from August 11, 2020 through October 31, 2020, BAJI anticipated that it could spread its staffing resources over that timeframe to ensure it was meeting its goals within the organization's budget. However, on a shorter timeframe, BAJI needs additional staff on a shorter timeframe, which will require adjusting the organization's budget and priorities for the next several months.

329. The adjustment is also challenging for BAJI as the organization caters to immigrant communities with a variety of language needs. Increasing staffing on a short timeframe poses significant challenges for the organization, because it must locate staff that can communicate with the particular community that the organization is targeting for outreach efforts.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Violation of the Enumeration Clause, and Fourteenth Amendment
(U.S. Const. art. I, § 2; U.S. Const. amend. XIV, § 2)

330. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

331. Under the Enumeration Clause of the U.S. Constitution, Congress, and, by delegation, the Secretary of Commerce, must conduct an "actual Enumeration" of the population. This clause requires that decisions relating to census-taking "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of N.Y.*, 517 U.S. 1, 20 (1996).

332. The COVID-19 pandemic severely disrupted the 2020 Census, resulting in

months of suspended operations and significant delays in crucial counting processes. Moreover, the public-health crisis continues to impact census operations, as the Bureau struggles to retain enumerators and engage in door-knocking in communities experiencing surges of the virus.

333. To navigate this emergency, the Bureau took necessary action to adjust its operational timelines in the COVID-19 Plan while seeking to maintain the operations and processes included in the Final Operational Plan that had been designed to help ensure a complete and accurate count.

334. Abruptly and without explanation, on August 3, 2020, Defendants abandoned the COVID-19 Plan and implemented the Rush Plan. The Rush Plan does not "bear a reasonable relationship to the accomplishment of an actual enumeration of the population." After delaying all operations for months, the Bureau and its staff repeatedly recognized that it was impossible to produce counts consistent with their duties to ensure a full, fair, and accurate count by December 31, 2020. Indeed, current conditions demonstrate that it is infeasible to obtain a fair and accurate count by the end of the year. Nevertheless, the Defendants abandoned their constitutionally mandated pursuit of fair and accurate data, in favor of the speed of the Rush Plan, and the inaccurate data it will produce.

335. Under these circumstances, the decision to curtail crucial 2020 Census operations violates the Enumeration Clause of the United States Constitution.

336. 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 Administrative Procedure Act—Arbitrary and Capricious
(5 U.S.C. § 706(2)(A))

337. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

338. The APA, 5 U.S.C. § 706(2), provides that a court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Rush Plan is final agency action because it marks the consummation

of the agency's decision-making process, and it is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

339. In determining whether an action violates the APA, courts consider whether the agency examined relevant data and articulated a satisfactory explanation for its decision, including formulating a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency wishes to depart from an earlier decision, it must acknowledge that change and any reliance interests its previous actions engendered. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105-06 (2015).

340. The Bureau spent several years developing its Final Operational Plan for the 2020 Census. That plan carefully determined the required length of each operation, including the appropriate length for data-collection and data-processing. It also included details about the implementation of the various operations.

341. The COVID-19 pandemic disrupted census operations, and the Bureau responded by adjusting its operations in its COVID-19 Plan. That plan involved retaining the details and the length of time of various operations laid out in the Final Operational Plan, but shifting the timeline for counting several months into the future to account for both the necessity of those operations and the public-health emergency.

342. The Bureau began implementing the plan, and critical operations were suspended and delayed through the summer. Bureau officials publicly and expressly recognized that it was no longer possible to comply with the December 31, 2020 deadline if the Bureau intended to fulfill its constitutional and statutory obligation of producing reasonably accurate population counts.

343. Without explanation and without citing any evidence, Defendants suddenly changed their position and issued a new plan with shortened timelines. Among other things, that change conclusively changed the legal rights and obligations of private households, who now have substantially less time to respond if they wish to be counted in the 2020 Census. Defendants

have provided no evidence to support rescinding the COVID-19 Plan, have failed to acknowledge or explain their departure from their previous conclusions as to the length of time necessary for an accurate census, and have cited no evidence that they could obtain accurate counts on the shortened timeframe. Defendants' unexplained and unjustifiable reversal is precisely the sort of arbitrary and capricious agency action that the Administrative Procedure Act forbids.

344. Defendants' decision also fails to account for several factors relevant to the decision, including the multiple-month long suspension in operations and delay of crucial census operations, the staffing shortages facing the Bureau, the meticulously designed and tested technical requirements for effective enumeration included in the Bureau's Final Operational Plan, and the various quality-control measures the Bureau must engage in to ensure that its reported data is accurate.

345. Consequently, Defendants' action is arbitrary and capricious.

346. This unlawful action has caused, is 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.

THIRD CLAIM FOR RELIEF
Violation of Administrative Procedure Act—Pretext
(5 U.S.C. § 706)

347. Plaintiffs incorporate by reference the allegations set forth in the preceding paragraphs.

348. Under the Administrative Procedure Act, agencies are required to disclose the "genuine justification[] for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2569, 2575-76. Courts will not accept "contrived reasons" provided by agencies as that would defeat the purpose of judicial review. *Id.* at 2576. Moreover, agencies cannot simply avoid providing reasoning for their decision-making altogether.

349. Defendants have decided to cut crucial operations in order to produce 2020 Census population results to the President by December 31, 2020. In announcing that decision, Defendants provided no legitimate justification for abandoning the COVID-19 Plan and

implementing the Rush Plan.

350. Any attempt by the Defendants to rely on the reporting deadline provided under the Census Act as justification for their decision is mere pretext. 13 U.S.C § 141(b).

351. For months, Defendants implemented the COVID-19 Plan, the timeline for which necessarily assumed the statutory deadlines could not defeat the constitutional duty to conduct an accurate enumeration, as applied to the extraordinary circumstances at hand. Defendants made significant adjustments, including months-long delays of census operations, on the assumption that the Bureau could and would conduct a full and robust count through the end of October 31, 2020. Since mid-April 2020, Defendants have expressly and publicly recognized that the Bureau could not provide a complete and accurate count by December 31, 2020. And President Trump maintained that the statutory deadlines need not be followed.

352. Defendants' reversal of position on the 2020 Census timeline appears driven by Defendants' efforts to ensure implementation of the President's unconstitutional Apportionment Exclusion Order, which attempts to exclude undocumented persons from the apportionment count and continues a long-running pattern of racially discriminatory and improperly politically motivated conduct of the 2020 Census.

353. In light of these considerations, Defendants' purported justification is pretextual and, thus, arbitrary and capricious under the Administrative Procedure Act.

354. Defendants' unlawful action has caused, is 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.

PRAYER FOR RELIEF

355. Plaintiffs respectfully request that this Court:

356. Declare that Defendants' promulgation of the Rush Plan, and corresponding revocation of the COVID-19 Plan is unconstitutional under the Enumeration Clause, and unlawful under the Administrative Procedure Act.

357. Vacate the Rush Plan, thereby reinstating the COVID-19 Plan.

358. Enjoin Defendants from implementing the Rush Plan or otherwise unlawfully

interfering with the COVID-19 Plan.

359. Award Plaintiffs costs, expenses, and reasonable attorneys' fees.

360. Award any other relief the Court deems just and proper.

Dated: August 18, 2020

LATHAM & WATKINS LLP

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: August 18, 2020

LATHAM & WATKINS LLP

By: */s/ Sadik Huseny*
Sadik Huseny

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
NATIONAL URBAN LEAGUE; BLACK ALLIANCE FOR JUST IMMIGRATION; LEAGUE OF WOMEN VOTERS; HARRIS COUNTY, TEXAS; KING COUNTY, WASHINGTON; CITY OF LOS ANGELES, CALIFORNIA; CITY OF SALINAS, CALIFORNIA; and CITY OF SAN JOSE, CALIFORNIA; RODNEY ELLIS, and ADRIAN GARCIA

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County of Residence of First Listed Defendant Washington County, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

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- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment Of Veteran's Benefits
- ☐ 151 Medicare Act
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BANKRUPTCY
- ☐ 422 Appeal 28 USC § 158
- ☐ 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent—Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC § 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced & Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation–Transfer ☐ 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
Administrative Procedure Act, 5 U.S.C. 701 et seq.

Brief description of cause:
Action to set aside unlawful agency action as arbitrary, capricious, and not in accordance with law, and declare Defendants' actions unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S), IF ANY *(See instructions):*

JUDGE Judge Lucy H. Koh DOCKET NUMBER 5:20-cv-05167-LHK; 5:20-cv-05169-LHK

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) ☐ **SAN FRANCISCO/OAKLAND** ☒ **SAN JOSE** ☐ **EUREKA-MCKINLEYVILLE**

DATE 08/18/2020 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Sadik Huseny

Sent: 8/18/2020 11:04:03 AM
Subject: FW: ATTORNEY CLIENT / WORK PRODUCT / DELIBERATIVE PROCESS PRIVILEGED RE: b(5) - DP/AC/WP
Attachments: b(5) - DP/AC/WP

Sent: 8/19/2020 8:17:13 AM
Subject: FW: ATTORNEY CLIENT / WORK PRODUCT / DELIBERATIVE PROCESS FW: SDNY draft brief
Attachments: b(5) - DP/AC/WP
b(5) - DP/AC/WP 75 - Pls.' Statement of Material Facts (56.1).pdf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5781 (JMF)

PLAINTIFFS' LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Local Civil Rule 56.1, Plaintiffs the State of New York et al. and the New York Immigration Coalition et al. submit the following statement of material facts as to which there is no genuine issue to be tried.

EXCLUDING UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE AFTER THE 2020 CENSUS WILL DEPRIVE CALIFORNIA AND/OR TEXAS OF CONGRESSIONAL SEATS

1. Since 1790, no decennial census has excluded any category of persons who usually reside in the United States on their basis of their citizenship or immigration status for purposes of

apportioning congressional representation. *See, e.g.*, *2020 Decennial Census Residence Rule and Residence Situations*, 80 Fed. Reg. 28,950, 28,950, (2015); Thompson Decl. ¶ 8 (Ex. 57).[1]

2. Millions of undocumented immigrants live in the United States and many have lived in the United States for many years. *See* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *Population Estimates: Illegal Alien Population Residing in the United States: January 2015* at 2 (Dec. 2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

3. California and Texas are consistently the two states with the largest populations of undocumented residents. *Id.* at 4-5.

4. According to the Department of Homeland Security, California had 2.9 million undocumented residents and Texas had 1.9 million undocumented residents in 2015. *Id.* at 2.

5. As of the most recent Congressional reapportionment following the 2010 Decennial Census, the average population of each U.S. House district is 710,767 people. *See* Kristin D. Burnett, *Congressional Apportionment*, U.S. Census Bureau (Nov. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (last visited July 30, 2020).

6. According to the United States Census Bureau, as of July 1, 2019, the population of the United States was estimated to be 328,239,523. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

[1] Citations to "Ex. __" are to the exhibits to the accompanying Declaration of Matthew Colangelo dated August 7, 2020.

BC-DOC-0000002362

7. If the July 1, 2019 Census Bureau estimate of the total United States population is divided by the total number of seats in Congress (435), the quotient is 754,574. *See id.*

8. The Memorandum states that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law." *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the "Memorandum") (ECF No. 1-1).

9. The Memorandum states: "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.*

10. A state in which 2.2 million people represent 6 percent of the population would have a total population of more than 36 million residents.

11. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of California was 37,253,956. U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: Apr. 1, 2010 to July 1, 2019* (NST-EST2019-02), https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html (last visited July 30, 2020).

12. According to the Census Bureau, as of July 1, 2019, the total population of the State of California was 39,512,223. *Id.*

13. The second most populous state in the United States is Texas. *Id.*

BC-DOC-0000002363

14. According to the United States Census Bureau, as of April 1, 2010, the total population of the State of Texas was 25,145,561. *Id.*

15. According to the United States Census Bureau, as of July 1, 2019, the total population of the State of Texas was 28,995,881. *Id.*

16. After California and Texas, the next most populous state is Florida, which, according to the Census Bureau, had a total population of 18,801,310 as of April 1, 2010, and an estimated total population of 21,477,737 as of July 1, 2019. *Id.*

17. Based on the Census Bureau's 2019 estimate, 2.2 million people would constitute approximately 7.6 percent of the estimated total population of Texas as of July 1, 2019. *See id.*

18. Based on the Census Bureau's 2019 estimate, 2.2 million people would constitute over 10 percent of the estimated total population of Florida as of 2019. *See id.*

19. The Memorandum anticipates that excluding undocumented immigrants from the apportionment base would deprive California of at least one seat in the House of Representatives. *See* 85 Fed. Reg. at 44,680.

20. Dr. Christopher Warshaw modeled the effects of excluding undocumented immigrants from the population count used to calculate Congressional reapportionment after the 2020 Census. *See* Warshaw Decl. at ¶ 11 (Ex. 58).

21. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that Texas will lose a seat in the House of Representatives is 98.3%. *Id.* § 5.2, Tbl. 7.

22. According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment basis, the probability that California will lose a seat in the House of Representatives is 72.1%. *Id.*

BC-DOC-0000002364

THE POLITICAL INFLUENCE OF PLAINTIFFS CONSTITUENTS WILL BE DIMINISHED BY THE MEMORANDUM'S EXCLUSION OF UNDOCUMENTED IMMIGRANTS FROM THE APPORTIONMENT BASE

23. Plaintiff the City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county. Gov't Pls.' Am. Compl. ¶ 42 (ECF No. 34).

24. Residents of the City and County of San Francisco will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

25. Plaintiff Monterey County, California is a political subdivision of the State of California. *See* Gov't Pls.' Am. Compl. ¶ 48 (ECF No. 34).

26. Residents of the Monterey County will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

27. Plaintiff Cameron County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 44 (ECF No. 34).

28. Residents of Cameron County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

29. Plaintiff El Paso County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 45 (ECF No. 34).

BC-DOC-0000002365

30. Residents of El Paso County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

31. Plaintiff Hidalgo County, Texas is a political subdivision of the State of Texas. Gov't Pls.' Am. Compl. ¶ 46 (ECF No. 34).

32. Residents of Hidalgo County will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

33. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a membership-based not-for-profit organization. Khalaf Decl. ¶ 4 (Ex. 26).

34. ADC has several thousand dues-paying members nationwide, with members in all 50 states including California and Texas. *See New York*, 351 F. Supp. 3d at 608; Khalaf Decl. ¶ 5 (Ex. 26).

35. Dr. Souhail Toubia is a member of ADC and a resident of Orange County, California. Khalaf Decl. ¶ 17 (Ex. 26).

36. George Majeed Khoury is a member of ADC and a resident of San Diego, California. *Id.*

37. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

38. George Majeed Khoury is a member of ADC and a resident of San Diego, California. Khalaf Decl. ¶ 17 (Ex. 26).

BC-DOC-0000002366

39. Because Dr. Toubia and Mr. Khoury reside in California, they will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

40. Plaintiff FIEL Houston Inc. ("FIEL") is a membership-based not-for-profit organization based in Houston, Texas. Espinosa Decl. ¶ 2 (Ex. 18).

41. Today, FIEL has approximately 11,000 members in the greater Houston area. *Id.* ¶ 3.

42. Deyanira Palacios is a member of FIEL and a resident of Montgomery County, Texas. *Id.* ¶ 19.

43. Because Ms. Palacios resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

44. Karen Ramos is a member of FIEL and a resident of Harris County, Texas. Espinosa Decl. ¶ 20 (Ex. 18).

45. Because Ms. Ramos resides in Texas, she will lose political power because of Texas' loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58).

46. Plaintiff Ahri for Justice ("Ahri") is a membership-based not-for-profit organization based in Los Angeles, California. Seon Decl. ¶ 2 (Ex. 43).

47. Ahri has roughly 220 individual members, with most residing in Southern California, and particularly in Orange and Los Angeles Counties. Some but not all of these members are U.S. citizens. *Id.* ¶ 4.

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48. Julie Kim is a member of Ahri and a resident of Orange County, California *Id.* ¶ 20.

49. Because Ms. Kim resides in California, she will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *Id.*

50. Simon Lee is a member of Ahri and a resident of Los Angeles County, California. *Id.* ¶ 21.

51. Because Mr. Lee resides in California, he will lose political power because of California's loss of at least one seat in the House of Representatives due to the exclusion of undocumented immigrants from the apportionment base. *See* Warshaw Decl. § 5.2, Tbl. 7 (Ex. 58); Seon Decl. ¶ 21 (Ex. 43).

DATED: August 7, 2020

Respectfully submitted,

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BC-DOC-0000002368

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BC-DOC-0000002369

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BC-DOC-0000002370

Sent: 9/14/2020 11:14:50 AM
To: Cannon, Michael (Federal) [MCannon@doc.gov]
CC: Keller, Catherine (Federal) [CKeller@doc.gov]
Subject: ATTORNEY CLIENT / WORK PRODUCT / DELIBERATIVE PROCESS / RE: FOR REVIEW-- Updated Draft- Operational Update
Attachments: Operational and Processing Options to meet September 30 Final.pdf; 645 pm August 14 2020 Census Update DRAFT FOR REVIEW.pdf

Thanks Al.

b(5) - DP/AC/WP

From: Albert E Fontenot (CENSUS/ADDC FED) <Albert.E.Fontenot@census.gov>
Sent: Saturday, August 15, 2020 4:06 PM
To: Cannon, Michael (Federal) <MCannon@doc.gov>
Cc: Ahmad, Ali M <ali.m.ahmad@census.gov>; Dillingham, Steven <steven.dillingham@census.gov>; Cogley, Nathaniel <nathaniel.cogley@census.gov>; Lamas, Enrique <enrique.lamas@census.gov>; Jarmin, Ron S <ron.s.jarmin@census.gov>; Olson, Stephanie (Federal) <SOlson@doc.gov>
Subject: Re: FOR REVIEW-- Updated Draft- Operational Update

Mike

Thank you, please see my comments

b(5) - DP/AC/WP

b(5) - DP/AC/WP

Al

Albert E. Fontenot Jr.
Associate Director, Decennial Census Programs
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Sent from my iPhone

On Aug 15, 2020, at 3:21 PM, Cannon, Michael (Federal) <MCannon@doc.gov> wrote:

CUI//PRIVILEGE/AWP//FED ONLY

b(5) - DP/AC/WP

Please let me know if you have any questions or concerns.

Thank you very much!

Best,

Mike

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From: Ali Mohammad Ahmad (CENSUS/ADCOM FED) <ali.m.ahmad@census.gov>
Sent: Friday, August 14, 2020 7:06 PM
To: Dillingham, Steven <steven.dillingham@census.gov>; Cogley, Nathaniel <nathaniel.cogley@census.gov>; Lamas, Enrique <enrique.lamas@census.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
Cc: Fontenot, Albert E <albert.e.fontenot@census.gov>; Jarmin, Ron S <ron.s.jarmin@census.gov>
Subject: Re: FOR REVIEW-- Updated Draft- Operational Update

Director: Thanks for chatting. Made the asterixed comments on slide 2 more grammatically friendly, per our discussion.

Ali Ahmad, Associate Director

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From: Ali Mohammad Ahmad (CENSUS/ADCOM FED)
Sent: Friday, August 14, 2020 5:24 PM
To: Steven Dillingham (CENSUS/DEPDIR FED) <steven.dillingham@census.gov>; Nathaniel Cogley (CENSUS/DEPDIR FED) <nathaniel.cogley@census.gov>; Enrique Lamas (CENSUS/DEPDIR FED) <Enrique.Lamas@census.gov>; Cannon, Michael (Federal) <MCannon@doc.gov>
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Subject: FOR REVIEW-- Updated Draft- Operational Update

b(5) - DP Only very minor updates from this afternoon on pages 2, 9, and 18. All updates in line with earlier edits.

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Operational and Processing Options to Meet Statutory Date of December 31, 2020 for Apportionment

August 3, 2020

Pre-decisional - Internal Use Only - Not for Public Distribution

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United States Census 2020

Bottom Line Up Front

Objective: We have developed this plan in response to your request to provide an apportionment count by the statutory deadline of December 31, 2020.

- **Maximizing** staff and production hours for field data collection operations to conclude field data collection by September 30, 2020.
- **Compressing** and streamline backend processing to deliver apportionment counts by December 31, 2020.
- **Achieving** an acceptable level of accuracy and completeness, with a goal of resolving at least 99% of Housing Units in every state.

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United States Census 2020

BC-DOC-0000002381

Nonresponse Followup Operational Options

Early Start of Nonresponse Followup Operations
6 Cycle 1a Area Census Offices (ACOs) began operations on July 16
6 Cycle 1b ACOs began operations on July 23
35 Cycle 2 ACOs were scheduled to begin operations on July 30; however, we started operations earlier in some ACOs where staff was available: • 17 ACOs – Started July 26 – 29 • 18 ACOs – Starter July 30
39 Cycle 3 ACOs were scheduled to begin operations by August 3: • 15 ACOs – Started last week, July 31 • 24 ACOs – Started today, August 3
All remaining ACOs were scheduled to begin August 11, but will begin operations by August 9: • 53 ACOs – Will start August 3 – 7 • 109 ACOs (all remaining) – August 9 • These ACOs will have to deploy staff regardless of the COVID-19 risk in those areas to open on these dates.

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United States Census 2020

BC-DOC-0000002382

Increased Replacement Training for Enumerators

Replacement Training Options	Potential Efficiency Gain / Applicable Costs to Implement
Inviting More People to Training	Over selection rates will address higher-than-expected no-show rates of 35%, bringing us closer to our target initial staffing levels.
Continual Replacement Training	Expect to conduct replacement training for at least 135K Enumerators due to attrition. Just over 11,000 training additional sessions: $90m total training cost

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United States Census 2020

BC-DOC-0000002383

Bonuses for Increased Work

Pay Bonus Options	Potential Efficiency Gain / Applicable Costs to Implement
Implement Enumerator Pay bonus to boost work hours from 19 to 25 per week: • Propose $100 for exceeding 25 hours/week	Expect 250,000 to qualify: $25m/week Increases capacity by 1.5 million work hours per week, or 80,000 more “19 hour” enumerators per week
Implement Enumerator Pay bonus for working multiple 25 hour weeks: • Propose $500 for completing 3 weeks of production • Can be renewed	Expect 150,000 to qualify: $75m total cost
Implement CFS Pay bonus for working multiple weeks: • Propose $750 for completing 3 weeks of production (from established start date) • Would require ‘acceptable’ minimum of 32 hours per week • Can be renewed	Expect 15,000 CFSs to qualify: $11.5m total cost per week

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United States Census 2020

BC-DOC-0000002384

Outreach Methods to Expand Reach to Underperforming Areas

Options	Potential Efficiency Gain / Applicable Costs to Implement
Expand the use of NRFU Travel Teams: • Moving teams that have successfully completed their areas to areas requiring additional attention	Using experienced staff minimizes the need to train new staff – particularly in areas where new staff are not available.
Implement outbound phone calling to conduct interviews: • Use telephone numbers from ERD Contact Frame • Used by enumerators in ACOs that are finishing up to help out in other ACOs	Enables enumeration in high COVID-19 risk areas and provides additional data collection capability.

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United States Census 2020

BC-DOC-0000002385

Adjustments to NRFU Contact Strategy

NRFU Adjustment Options	Potential Efficiency Gain / Applicable Costs to Implement
Close out self-reported vacants that are also Administrative Record (AdRec) vacant	Reduce workload by 140k cases
Reduce contact attempts for self-reported vacants from 6 to 1, if HU is confirmed vacant	Increase enumerator productivity
Reduce contact attempts for Re-Interview (RI) and Self-Response Quality Assurance (SRQA) cases from 6 to 3	Reduce attempts from 6 to 3 for 1.9 million cases, increase enumerator productivity
Eliminate Random RI, and depend on analytic sampling	Reduce NRFU workload by 800k cases – potential reduction in quality of enumerator work
Make “pop count only” sufficient earlier in the operation	Still being researched, TBD

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United States Census 2020

BC-DOC-0000002386

Implement Additional Administrative Record Options

Administrative Records Options	Potential Efficiency Gain / Applicable Costs to Implement
We are in consultation to revise our AdRec strategy to use IRS-only (no corroborating sources) for "pop count only" cases	Reduce attempts from 6 to 1 for estimated 3.8 million cases, contingent on IRS approval, increasing enumerator productivity
Close out cases with conflicting AdRec showing both vacant and delete	Reduce attempts from 6 to 1 for 1.9 million cases, increasing enumerator productivity

BC-DOC-0000002387

Overview of Backend Processing

Assumptions:

1. Highly compressed schedule for 2020 Census data processing and review of data products.
2. Post-processing must start by October 1, 2020.
3. Post-processing work activities are limited to those required to produce apportionment counts. Delivery of redistricting data products will be negatively impacted under this revised plan and we are determining full impacts.
4. All of these activities represent abbreviated processes or eliminated activities that will reduce accuracy.

BC-DOC-0000002388

Compressing Backend Processing

Adjusted Activity	Impact and Risks
Finalize Master Address File (MAF) updates from remaining field operations by 9/4/20 Address updates from continued field work after 9/4/20 will not be applied to the MAF	We do not anticipate that the resulting number of updates not included will be highly significant. However, increases risk of inaccuracy.
Eliminate the step that includes Decennial Statistical Studies Division (DSSD) review of the MAF extract	Risk of missing and therefore propagating errors, however the MAF is the most accurate ever.
Lock Geographic processing on 9/25/20 and deliver the final 2020 Census address universe by 10/14/20	Reduces a 35 day processing duration to 19 days.
Cancel Count Review Event 2, eliminating the need for late Group Quarters Enumeration (GQE) operations	State demographer review of GQ data will be cancelled. The Demographic and Decennial staffs will work together to develop the message and communicate it to the Federal State Cooperative for Population Estimates (FSCPE)/states. The risk is virtually certain vocal objections from the FSCPE State Demographers and the State Governors they serve.

BC-DOC-0000002389

Compressing Backend Processing - Continued

Adjusted Activity	Impact and Risks
Create a separate processing stream for the Enumeration of Transitory Locations (ETL) and Service Based Enumeration (SBE) operations that follows the Federally Affiliated Count Overseas (FACO) processing approach. This will enable adding ETL and SBE population counts state-by-state significantly later in the Census Unedited File (CUF) production process.	This file needs to be delivered to POP by the time the CUF – the basis for the apportionment delivery – review is scheduled to be complete, by December 18. Additionally, ETL permits the reporting of a Usual Home Elsewhere (UHE), which will not be able to be processed with this new approach. The CUF will have to be re-run prior to the processing of the Census Edited File (CEF) in order to add in the SBE/ETL population for the Public Law 94-171 Redistricting file. The Apportionment Team will need to change its processing plans and conduct testing to ensure the proper integration of ETL/SBE state counts.
Compress POP division and DSSD review and processing times	A compressed review period creates risk for serious errors not being discovered in the data – thereby significantly decreasing data quality. Additionally, serious errors discovered in the data may not be fixed – due to lack of time to research and understand the root cause or to re-run and re-review one or multiple state files.
Compress time for creating/verifying apportionment data and preparation of transmittal package for DOC	A compressed review period creates risk for errors being present in the data.

BC-DOC-0000002390

Implementation of the Presidential Memo

A team has been established and is tasked with deriving a process utilizing sound statistical methods and meeting tests of operational feasibility, to achieve the goals of directives from Secretary Ross regarding implementation of the Presidential Memo. To achieve this, the Census will:

- Build upon the work we have already done based on Executive Order 13880, "Collecting Information about Citizenship Status in Connection with the Decennial Census".
- Use all administrative records to the extent they are available. Using these records, in combination with other data already obtained regarding citizenship status, we will further refine the non-citizen category into legal, illegal, or unknown.
- Incorporating this work into the schedule to meet the current legal mandates.

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Announcing the Replanned Operational Schedule

- **Announce:** Statement from Director Dillingham issued by Monday afternoon or as approval given with new schedule and re-plan outline.

- **Update Webpage:** We will update central schedule webpage with new dates. (current page reflects re-planning status)

- **Rollout:** We will follow a controlled rollout to give appropriate embargoed heads up to key Congressional offices, and then post and distribute the updated materials to Census Bureau staff, partners, intergovernmental stakeholders, and the media.

Shape your future START HERE >
United States Census 2020

BC-DOC-0000002392

Questions?

Shape your future START HERE >

United States Census 2020

Sent: 8/10/2020 7:08:30 PM
Subject: FW: b(5) - DP
Attachments: 2020-08-10 One Pager on Options v3 nc,sd.docx; ATT00001.htm

Sent: 8/10/2020 2:44:01 PM
Subject: FW: SDNY PM litigation scheduling update
Attachments: 77 - Pls.' Mem. ISO SJ-PI.pdf; 76.56 - Barreto Decl..pdf; 76.57 - Thompson Decl..pdf; 76.58 - Warshaw Decl..pdf; 75 - Pls.' Statement of Material Facts (56.1).pdf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF)

NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5781 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR PRELIMINARY INJUNCTION

BC-DOC-0000002400

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INTRODUCTION

This lawsuit challenges Defendants' flagrantly unconstitutional and unlawful decision to exclude undocumented immigrants from the total-population base that is used to apportion congressional seats among the States. This decision violates the unambiguous mandate in Article I and the Fourteenth Amendment that *all* "persons in each State" be included "according to their respective [n]umbers" in the apportionment base. U.S. Const. amend. XIV, § 2; *id.* art. I, § 2, cl. 3. Both this Court and the Supreme Court have already determined that this language requires the federal government "to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 514 (S.D.N.Y. 2019), *aff'd* 139 S. Ct. 2551 (2019); *accord Evenwel v. Abbott*, 136 S. Ct. 1120, 1129 (2016). The inclusion of all immigrants was expressly discussed and endorsed in the debates over the Fourteenth Amendment. And every decennial census since the Fourteenth Amendment's adoption has counted all residents without regard to their citizenship or immigration status.

The sheer clarity of this constitutional command entitles Plaintiffs to summary judgment on their constitutional claims against Defendants' exclusionary policy. Defendants have no discretion or authority to disregard the Constitution's plain text and extensive history, to flout prior rulings from this Court and the Supreme Court, or to break with more than two hundred years of settled practice.

Plaintiffs are also entitled to summary judgment because Defendants' exclusion of undocumented immigrants from the apportionment base is an *ultra vires* violation of the statutory provisions that Congress enacted to implement the Constitution's clear requirements. Congress has mandated that the decennial enumeration count all persons, regardless of immigration status, and that the President's apportionment report to Congress must be based

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solely on this enumeration of all persons. *See* 13 U.S.C. § 141(a), (b); 2 U.S.C. § 2a. Defendants' exclusionary policy will necessarily conflict with these statutory requirements.

Finally, in the alternative, Plaintiffs are entitled to a preliminary injunction on their constitutional and statutory claims. Such relief is essential because Plaintiffs and their residents or constituents are suffering immediate and irreparable injury from Defendants' sudden announcement of their exclusionary policy. Most immediately, Defendants' actions are deterring immigrant households from responding to the ongoing enumeration for the 2020 census by sowing confusion, mistrust, and fear among immigrant households about the consequences of responding to the census. That deterrent effect is heightened by the plainly xenophobic and discriminatory purpose animating Defendants' exclusionary policy—the latest in a long string of open attacks by this administration on immigrant communities and the cities and States where they reside. And Defendants have only exacerbated these immediate harms to the ongoing enumeration and underscored the need for immediate relief with their recent announcement that they are unilaterally curtailing census follow-up operations by a full month, from October 31 to September 30.

Under these unusual and pressing circumstances, Plaintiffs are entitled to expedited summary judgment on their constitutional and statutory claims, or a preliminary injunction to avert immediate harm.

BACKGROUND

I. Constitutional and statutory framework.

The Constitution requires that seats in the House of 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; *see id.* art. I, § 2, cl. 3. The number of Representatives apportioned to each State, along with the two Senators

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given to each State, determines the allocation among the States of electors in the Electoral College. *Id.* art. II, § 1, cl. 2; *see also* 3 U.S.C. § 3. To apportion Representatives among the States, and in turn to allocate electors among the States, the Constitution requires a decennial "actual Enumeration" of all persons living here—the resulting numbers from which must constitute the apportionment base. U.S. Const. art. I, § 2, cl. 3.

The Constitution provides that the decennial enumeration shall be made "in such manner as [Congress] shall direct by law." *Id.* In the Census Act, Congress has assigned the responsibility of conducting the enumeration to the Secretary of Commerce, who may delegate authority for establishing census procedures to the Census Bureau. 13 U.S.C. §§ 2, 4, 141.

The Census Act sets specific deadlines for conducting the enumeration and corresponding apportionment of Representatives. The Act requires that the decennial census be taken on April 1, 2020, the "decennial census date." *Id.* § 141(a). Within nine months of the decennial census date, *i.e.*, by January 1, 2021, the Secretary of Commerce must report to the President "[t]he tabulation of total population by States" that is "required for the apportionment of Representatives in Congress among the several States." *Id.* § 141(b). Between January 3 and January 10, 2021, the President must transmit to Congress "a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled" using the method of equal proportions, with each State receiving at least one Member. 2 U.S.C. § 2a(a). Within fifteen days of receiving the President's statement, the Clerk of the House of Representatives must transmit "to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Id.* § 2a(b).

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II. The Presidential Memorandum.

On July 21, 2020, President Trump issued a memorandum declaring that "[f]or the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude" undocumented immigrants from the congressional apportionment base "to the maximum extent feasible and consistent with the discretion delegated to the executive branch." *Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (the "Memorandum") (ECF No. 1-1).[1] The Memorandum asserts that "[i]ncreasing congressional representation based on the presence of aliens who are not in a lawful immigration status would also create perverse incentives encouraging violations of Federal law," and that "States adopting policies . . . that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." *Id.*

The Memorandum makes clear that the President both understands and intends that excluding undocumented immigrants from the apportionment base will reallocate political power between the States, and specifically that it will weaken political influence for States with larger undocumented immigrant populations. *See id.* Referring to one State whose residents include more than two million undocumented immigrants,[2] the Memorandum notes that "[i]ncluding these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." *Id.*

[1] All docket references are to 20-CV-5770 (JMF) unless otherwise specified.

[2] This State is California, but Texas is similarly situated. *See* Pls.' Rule 56.1 Stmt. ¶¶ 3-4. The Governmental Plaintiffs include two local jurisdictions in California and three counties in Texas; and the NGO Plaintiffs have members residing in those States, *see id.* ¶¶ 23-51.

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The Memorandum accordingly directs the Secretary of Commerce, "[i]n preparing his report to the President under section 141(b) of title 13," to "take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable," to exclude undocumented immigrants from the final determination regarding the "whole number of persons in each State" that the President transmits to Congress pursuant to 2 U.S.C. § 2(a). Memorandum, 85 Fed. Reg. at 44,679-80.

III. Events precipitating the Presidential Memorandum.

The Presidential Memorandum was not issued in a vacuum, but against the backdrop of prior litigation about the census. In *New York v. Department of Commerce*, this Court held that Secretary of Commerce Wilbur Ross's decision to add a citizenship question to the 2020 census violated the Administrative Procedure Act and enjoined the addition of the question, 351 F. Supp. 3d—a decision affirmed in part by the Supreme Court on the ground that the reason the Secretary provided for adding the citizenship question was pretextual. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). After trial, new evidence emerged about the reason for adding the question.

In August 2015, Republican redistricting strategist Thomas Hofeller authored a study advising that a citizenship question on the census was necessary to gather data to exclude noncitizens from the redistricting population base, a result "advantageous to Republicans and Non-Hispanic Whites."[3] He then helped ghostwrite a letter to the Commerce Department requesting a citizenship question that was funneled through several intermediaries before

[3] Pls.' Mot. for Order to Show Cause, 18-cv-2921 (JMF), ECF No. 595-1 at 63 (May 30, 2019) (citing exhibits).

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becoming part of the Secretary's effort to add a citizenship question.[4] Less than a week after the Supreme Court's decision, Defendant Trump confirmed that efforts to add the citizenship question was intended to curtail the growing political power of immigrant communities of color. He first stated that the citizenship question was "very important [] to find out if someone is a citizen as opposed to an illegal."[5] A few days later, Defendant Trump said: "Number one . . . you need it for Congress, for districting. You need it for appropriations. Where are the funds going? How many people are there?"[6] The following week, he noted that "[s]ome states may want to draw state and local legislative districts based upon the voter-eligible population."[7]

In announcing the Presidential Memorandum, Defendant Trump expressly linked the Presidential Memorandum to the citizenship question effort, proclaiming he was fulfilling his promise that he would "not back down in [his] effort to determine the citizenship status of the United States population."[8] Defendant Trump has also linked the Memorandum to a broader campaign against so-called sanctuary cities and States—jurisdictions that elect in some circumstances to limit their cooperation with federal immigration enforcement.[9] The Presidential

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[4] *N.Y. Immig. Coal.* Pls.' Mot for Sanctions, 18-CV-2921 (JMF), ECF No. 635-1 at 124–31 (July 16, 2019); Defs.' Opp. to Ltr. Mot. to Compel, 18-CV-2921 (JMF), ECF No. 451 at 3 (Oct. 30, 2018); Pls.' Jt. Proposed Post-Trial Findings of Fact, 18-CV-2921 (JMF), ECF No. 545 at 52–53 (Nov. 21, 2018) (citing exhibits).

[5] *Remarks by President Trump at Signing of H.R. 3401* (July 1, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-3401/.

[6] *Remarks by President Trump Before Marine One Departure* (July 5, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-51/.

[7] *Remarks by President Trump on Citizenship and the Census* (July 11, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

[8] *Statement from the President Regarding Apportionment* (July 21, 2020), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-apportionment/

[9] Defendant Trump has sought by executive order to bar "sanctuary jurisdictions" from receiving

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Memorandum states that one of its objectives is to punish States for enacting policies that the federal government disfavors. Memorandum, 85 Fed. Reg. at 44,680.

The Presidential Memorandum is part of a broader pattern of Defendant Trump's "expressed animus against non-white, non-European immigrants." *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018); *see also id.* at 1100 (citing such statements). To take just one example, he asked during a meeting concerning "immigrants from Haiti, El Salvador, and African countries," why the United States was "'having all these people from shithole countries come here?'" and "suggested that the United States should instead bring more people from countries such as [mostly white] Norway.'" *Id.* He also asked: "'Why do we need more Haitians?' and insisted they be removed from an immigration deal." *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018). In 2018, he referred to certain immigrants as "animals."[10]

ARGUMENT

I. Standard of review.

Summary judgment is warranted when "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).

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federal grants. *See* Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). In his 2020 State of the Union address, Defendant Trump denounced "the sanctuary city of New York," and the next day, the Acting Secretary of Homeland Security announced that New York State residents would be prohibited from enrolling or re-enrolling in Trusted Traveler programs in retaliation for New York's sanctuary laws. Transcript, *Trump's 2020 State of the Union Address*, N.Y. Times (Feb. 5, 2020), https://www.nytimes.com/2020/02/05/us/politics/state-of-union-transcript.html; Nick Miroff, *Trump suspends Global Entry, traveler programs for New York residents over 'sanctuary' policies*, Wash. Post (Feb. 5, 2020), https://www.washingtonpost.com/immigration/trump-suspends-global-entry-traveler-programs-for-new-york-residents-over-sanctuary-policies/2020/02/05/e2755790-4890-11ea-9475-535736e48788_story.html.

[10] Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. Times (May 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

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To obtain a preliminary injunction, Plaintiffs must establish that they are likely to suffer irreparable harm absent preliminary relief; they are likely to succeed on the merits; the balance of the equities tips in their favor; and an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

II. Plaintiffs include jurisdictions and residents of jurisdictions that would lose representation if undocumented immigrants were excluded from the population base used for congressional apportionment.

Plaintiffs have standing to bring this challenge because—among other injuries—the exclusion of undocumented immigrants from the apportionment base will cause Plaintiffs or the jurisdictions in which Plaintiffs operate to lose seats in the House of Representatives. Such a loss "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *New York*, 351 F. Supp. 3d at 607 (quotation marks omitted); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (holding that the plaintiffs demonstrated standing for purposes of summary judgment by submitting an expert affidavit showing that "it is a virtual certainty that Indiana will lose a seat . . . under the Department's Plan").

The Memorandum expressly states that the policy of excluding undocumented immigrants from the apportionment base is intended to, and is certain to cause, California to lose at least one seat in the House of Representatives. And it is certain to have the same effect on Texas. The Memorandum states that "Current estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population. Including these illegal aliens in the population of the State for the purpose of apportionment could result in the allocation of two or three more congressional seats than would otherwise be allocated." Memorandum, 85 Fed. Reg. at 44,680. According to the Department of Homeland Security, as of 2015, California had 2.9 million undocumented residents and Texas had 1.9 million undocumented residents in 2015. Pls.' 56.1 Stmt. ¶ 4. According to the Census Bureau's

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most recent estimates, as of July 1, 2019, the total population of California was 39,512,223 and the total population of Texas was 28,995,881. Pls.' 56.1 Stmt. ¶¶ 12, 14. These estimates from the Census Bureau and DHS indicate that undocumented immigrants constitute approximately 7.3% of the population of California and approximately 6.6% of the population of Texas. As of the most recent congressional reapportionment following the 2010 Decennial Census, the average population of each U.S. House district is 710,767 people. Pls.' 56.1 Stmt. ¶ 5. Based on these facts alone, there can be no dispute that the exclusion of undocumented immigrants will cause California and Texas to lose at least one seat in the House.

Additionally, Plaintiffs' expert, Dr. Christopher Warshaw, confirms that the Memorandum will "almost certainly" cause certain States to lose seats in Congress. Warshaw Decl. ¶ 11 (Ex. 58).[11] Dr. Warshaw modeled the effects of excluding undocumented immigrants from the population count used to calculate congressional reapportionment after the 2020 census. Pls.' 56.1 Stmt. ¶ 20; Warshaw Decl. ¶ 11 (Ex. 56). According to Dr. Warshaw, if undocumented immigrants are excluded from the apportionment base, there is a 98.3% probability that Texas will lose a seat in the House of Representatives, and a 72.1% probability for California. Pls.' 56.1 Stmt. ¶¶ 21–22; Warshaw Decl. ¶ 47 tbl. 8 (Ex. 58).

The Governmental Plaintiffs include jurisdictions in California (the City and County of San Francisco, and Monterey County) and Texas (Cameron, El Paso, and Hidalgo Counties). *See* Governmental Plaintiffs' Am. Compl. ¶¶ 42, 44–46, 48 (ECF No. 34). The NGO Plaintiffs include organizations with members residing in both States. Pls.' 56.1 Stmt. ¶¶ 33–34 (ADC); *id.* ¶¶ 40–41 (FIEL Houston, Inc.); *id.* ¶¶ , 46–47 (Ahri). Residents of these Plaintiff counties

[11] Citations in this Memorandum to "Ex. __" are to the exhibits to the accompanying Declaration of Matthew Colangelo dated August 7, 2020.

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and the Texas- and California-based members of Plaintiff organizations will suffer a loss of political power if Texas or California lose a congressional seat. Indeed, ADC has members in all 50 states—*any* change to apportionment is certain harm a member of ADC. Pls.' 56.1 Stmt. ¶ 34.[12]

These injuries are traceable to Defendants' recent actions and redressable by a favorable ruling from this Court. There is no question that the exclusion of undocumented immigrants from the apportionment base will *directly* affect the apportionment. Indeed, the Presidential Memorandum itself both acknowledges and intends this effect on apportionment, *see* Memorandum, 85 Fed. Reg. at 44,680. Moreover, this Court previously found—and the Supreme Court agreed—that the predictable effects of defendants' actions on the accuracy of the ongoing enumeration are sufficient to establish traceability. *New York*, 351 F. Supp. 3d at 619–25. And all of these injuries will plainly be redressed by a favorable ruling that requires Defendants to do what the Constitution mandates: "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2.

III. Defendants' decision to exclude undocumented immigrants from the apportionment base violates Article I and the Fourteenth Amendment.

A. The Constitution explicitly requires the population base for apportionment to include the whole number of persons in each State.

Defendants' blanket exclusion of undocumented immigrants from the apportionment base, without regard to their physical residence here, flagrantly violates the Constitution. The Constitution's plain language requires that all "persons" physically living "in each State" be

[12] Plaintiffs' representational harms alone suffice to establish injury-in-fact for standing purposes. To the extent Defendants oppose summary judgment on standing grounds, Plaintiffs intend to present additional evidence establishing the other injuries alleged in their complaints. *See* Governmental Plaintiffs' Am. Compl. ¶¶ 117–36 (ECF No. 34); NGO Plaintiffs' First Am. Compl. ¶¶ 19–83 (ECF No. 62).

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included in the apportionment count—regardless of their citizenship or immigration status. U.S. Const. amend. XIV, § 2; *id.* art. I, § 2, cl. 3 (requiring apportionment "according to [the States'] respective Numbers"). The Framers of the Fourteenth Amendment specifically chose to refer to "persons" rather than "citizens" in the Fourteenth Amendment's text to ensure that noncitizens residing in this country are included in apportioning House seats. The Supreme Court confirmed four years ago that the Constitution requires congressional apportionment based on each State's total population, including undocumented immigrants. *See Evenwel.* 136 S. Ct. at 1123. And settled practice for more than two hundred years has adhered to this rule.

Defendants have turned this constitutional and historical consensus on its head. They have treated as dispositive a factor that has always been considered immaterial for apportionment (immigration status). And they have treated as immaterial a factor that has consistently determined the apportionment base since the first census in 1790 (physical residence). Defendants cannot fundamentally alter the constitutional order by decreeing that millions of undocumented immigrants who indisputably live in this country are not "persons."

1. The Constitution's text unambiguously mandates counting all persons, including undocumented immigrants, in the apportionment base.

The constitutional mandate to base apportionment on all persons living in the United States, without regard to their immigration status, is clear. Section 2 of the Fourteenth Amendment requires that U.S. House seats "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 (emphasis added). And Article I requires that the "respective Numbers" of each State be determined by an "actual Enumeration" of the total population. *Id.* art. I, § 2, cl. 3.

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The Supreme Court has held that the term "person" in the Fourteenth Amendment includes undocumented immigrants. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Court explained that, "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sentence of that term." *Id.* Because undocumented immigrants "are clearly 'persons,'" the plain text of the Fourteenth Amendment is "not ambiguous" in mandating that undocumented immigrants living in this country must be included for apportionment. *Fed'n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). This Court has recognized as much: "[b]y its terms, . . . the Constitution mandates that every ten years the federal government endeavor to count *every single person* residing in the United States, whether citizen or noncitizen, *whether living here with legal status or without*," and "[t]he population count derived from that effort is used . . . to apportion Representatives among the states." *New York*, 351 F. Supp. 3d at 514 (emphases added).

By contrast, the Constitution uses distinct language when referring to a subset of persons. For example, the Constitution repeatedly uses the term "citizens" rather than "persons" to describe the subset of persons living here who hold citizenship. *See, e.g.*, U.S. Const. art. 1, § 2, cl. 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States"). The same distinction appears in Section 2 of the Fourteenth Amendment, which requires the apportionment base to include "the *whole number of persons* in each State," but then provides that a State that denies the right to vote to "*citizens* of the United States" will have its basis of representation reduced. U.S. Const. amend. XIV, § 2 (emphasis added).

Similarly, the Constitution originally contained two express exclusions from the apportionment base, neither of which turned on immigration status. First, the original Apportionment Clause excluded all "Indians not taxed," U.S. Const. art. I, § 2, cl. 3, an

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exception that became irrelevant after the Indian Citizenship Act of 1924, Pub. L. No. 68 -175, 43 Stat. 253. Second, it infamously counted slaves as only three-fifths of a person for apportionment, U.S. Const. art. I, § 2, cl. 3, an exception overturned by the Fourteenth Amendment. "By making express provision for Indians and slaves, the Framers demonstrated their awareness that" the otherwise "all-inclusive" language delineating the population base for apportionment does not permit the exclusion of any other residents. *FAIR*, 486 F. Supp. at 576.

2. The Constitution's broad terms reflected a conscious intent to include all persons, including all immigrants, in the apportionment base.

The choice to base apportionment on total population, regardless of citizenship or immigration status, was no accident. Both the original Framers and the Framers of the Fourteenth Amendment chose to "allocat[e] House seats to States" with "total population as the congressional apportionment base," a mandate based on their fundamental "theory of the Constitution." *Evenwel*, 136 S. Ct. at 1128–29.

"At the time of the founding, the Framers confronted the question" of how to allocate seats in the new government to the States. *Id.* at 1127. "The Framers' solution, now known as the Great Compromise, was to provide each State the same number of seats in the Senate, and to allocate House seats based on States' total population," that is, "'*according to their respective Numbers*.'" *Id.* (quoting U.S. Const. art. I, § 2, cl. 3) (emphasis in original). In selecting all residents as the basis for apportionment, the Framers specifically considered and rejected other proposals, such as allocating House "representation based on wealth or property." 1 The Records of the Federal Convention of 1787 ("Farrand's Records"), at 542 (Max Farrand ed., 1911) (Pierce Butler). As James Madison explained, "[i]t is a fundamental principle of the proposed Constitution that as the aggregate number of representatives allotted to the several

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States, is to be … founded on the aggregate *number of inhabitants*." The Federalist No. 54 (James Madison) (emphasis added).

The Framers made clear that basing apportionment on total population guaranteed every person representation in the House, regardless of their legal status, thus ensuring that the House will "be the most exact transcript of the whole Society," 1 Farrand's Records, *supra*, at 142 (James Wilson), and provide representation to "every individual of the community at large," *id.* at 473 (Alexander Hamilton). Thus, as the Supreme Court has explained, "the basis of *representation* in the House was to include all inhabitants," *Evenwel*, 136 S. Ct. at 1127, including women, children, indentured servants, and many other individuals who did not have the right to vote or full legal status. *See Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990); *see also Wesberry v. Sanders*, 376 U.S. 1, 13 ("[W]hen the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.").

When drafting the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats and reaffirmed that apportionment must be based on *all persons living* in each State—including noncitizens. "Concerned that Southern states would not willingly enfranchise freed slaves, and aware that 'a slave's freedom could swell his state's population for purposes of representation in the House,'" the Fourteenth Amendment's Framers "considered at length the possibility of allocating House seats to states on the basis of voter population" or citizen population. *Id.* (quoting Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account of the Enactment of the Fourteenth Amendment 28 (1997)). For example, on December 5, 1865, Thaddeus Stevens proposed apportioning Representatives among the States "according to their respective legal voters," specifying that "for this purpose none may be named

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as legal voters who are not either natural-born citizens or naturalized foreigners." Cong. Globe, 39th Cong., 1st Sess. 10 (1865).

Later, on January 16, 1866, the Joint Committee of Fifteen on Reconstruction that drafted the Fourteenth Amendment initially voted to adopt a proposal that would have required apportioning House seats based on "the whole number of citizens of the United States in each state." Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, 49–52 (Ex. 52).[13] After further deliberations, however, Representative Conkling "moved to amend the proposed article by striking out the words 'citizens of the United States in each state,' and inserting in lieu thereof the words, 'persons in each State, including Indians not taxed." *Id.* at 52. The Joint Committee adopted Conkling's amendment by a vote of 11-3. *Id.*

Representative Conkling explained that basing apportionment on "persons" rather than "citizens" was essential to passage of the Fourteenth Amendment:

> It has been insisted that "citizens of the United States" and not "persons" should be the basis of representation and apportionment. These words were in the amendment as I originally drew it and introduced it, but my own judgment was that it should be "persons," and to this the committee assented.
>
> There are several answers to the argument in favor of "citizens" rather than "persons." The present Constitution is, and always was opposed to this suggestion. 'Persons,' and not 'citizens,' have always constituted the basis.
>
> Again, it would narrow the basis for taxation and cause considerable inequalities in this response, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year.

[13] Where indicated, Plaintiffs have filed certain of the original sources cited in this discussion as Exhibits to these papers. Plaintiffs can provide the Court with copies of other legislative or historical materials if it would assist the Court's review.

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> Again, many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these States are to pass upon the amendment. It must be acceptable to them.

Cong. Globe, 39th Cong., 1st Sess. 2767, at 359 (1866).

The Framers of the Fourteenth Amendment further made clear that the Amendment requires including *all* immigrants in the apportionment base. As Representative John Bingham explained, the "*whole immigrant population* should be numbered with the people and counted as part of them" because "[u]nder 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." *Id.* at 432 (emphases added); *see also id.* at 2944 (Sen. Williams) ("Representation is now based upon population," including "foreigners not naturalized."). Proponents of maintaining the total-population apportionment base repeatedly declared their refusal to "throw[] out of the basis at least two and a half millions of unnaturalized foreignborn men and women." *Id.* at 1256 (Sen. Henry Wilson); *see also, e.g.*, *id.* at 2987 (proposal to apportion based on voting population was "blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis"); *id.* at 411 (Rep. Burton Cook) (representation based on voters improperly "takes from the basis of representation all unnaturalized foreigners").

The Framers believed that excluding residents from the apportionment base, including immigrants, would fatally undermine a cornerstone of the Constitution—"equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. A basic "idea of the Constitution" has always been, and continues to be, that "the whole population is represented; that although all do not vote, yet all are heard." Cong. Globe, 39th Cong., 1st Sess. 705 (1866) (Sen. William Fessenden). No matter a person's legal status, the Framers emphasized, "[a]ll the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its

laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2962 (1866) (Sen. Luke Poland). As Senator Jacob Howard explained when introducing the amendment's final language on the Senate Floor:

> Its basis of representation is numbers . . . that is, the whole population. The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.

Cong. Globe, 39th Cong., 1st Sess. 2766–67 (1866).

Defendants' actions to exclude an entire category of persons living in this country from apportionment break this foundational promise and flout the explicit intent of the Framers of the Fourteenth Amendment.

3. The Supreme Court has determined that the Constitution requires counting all persons, including undocumented immigrants, for apportionment.

Just four years ago, the Supreme Court confirmed that the Fourteenth Amendment requires including all immigrants in apportioning House seats. In *Evenwel*, the plaintiffs argued that Texas was required to exclude noncitizens—many of whom are undocumented—in equalizing population for legislative districts within the State. The Supreme Court rejected this claim on the ground that, with respect to *inter*-state apportionment, Section 2 of the Fourteenth Amendment "retained total population as the congressional apportionment base." *Evenwel*, 136 S. Ct. at 1128. The Court emphasized: "[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 1128–29. The concurring Justices agreed that "House seats are apportioned based on total population."

Id. at 1148 (Alito, J., concurring in the judgment); *see also id.* at 1138 (Thomas, J., concurring in the judgment) (similar).

Thus, all nine Justices in *Evenwel* agreed that apportionment of House seats among the States must be based on total population, including noncitizens. And that constitutional determination was central to the Court's rejection of the plaintiffs' claim there. The Presidential Memorandum thus defies the Supreme Court's decision of just four years ago.

4. Centuries of established practice further confirm that the apportionment base must include undocumented immigrants.

Evenwel is consistent with not only the Constitution's clear text and extensive history, but also more than two hundred years of unbroken practice that has always included all persons residing in each State, regardless of their citizenship or immigration status, in the apportionment base. *See Evenwel*, 136 S. Ct. at 1133 (relying on "settled practice"). Judicial "interpretation of the Constitution" may be "guided by a Government practice that has been open, widespread, and unchallenged since the early days of the Republic." *Dep't of Commerce*, 139 S. Ct. at 2567 (internal quotation marks and citations omitted). And the Supreme Court has emphasized "the importance of historical practice in" understanding the Enumeration Clause specifically. *Wisconsin v. City of New York*, 517 U.S. 1, 21 (1996).

Since the first census in 1790, "[t]he Census Bureau has always attempted to count every person residing in a state on Census day, and the population base for purposes of apportionment has always included all persons, including aliens both lawfully and unlawfully within our borders." *FAIR*, 486 F. Supp. at 576; *see, e.g.*, Census Act of 1790, S. 101, 1st Cong. § 5, (1790). Both Congress and the Executive Branch have long made clear that this unbroken historical practice is constitutionally required.

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Congress has repeatedly rejected statutory proposals to exclude all noncitizens or undocumented immigrants from the apportionment base on the ground that the Constitution forbids any such exclusion. For example, in 1929, Congress rejected proposals to amend the Census Act to exclude noncitizens from apportionment after members of the House and Senate repeatedly declared that "the plain mandate of the Constitution" requires counting all persons, including all noncitizens, for apportionment. 71 Cong. Rec. 1910 (May 25, 1929) (Sen. Bratton); *see, e.g.*, *id.* at 1958 (May 27, 1929) (Sen. Reed), 2451-52 (June 6, 1929) (Rep. Griffith). The Senate's legislative counsel provided a legal opinion confirming that all immigrants living here must be included given the Constitution's "'natural and obvious' meaning," "the history of the fourteenth amendment, the evidence of the records of the Constitutional Convention, and the uniform past congressional construction of the term by Congress in its apportionment legislation." *Id.* at 1822 (May 23, 1929).

In 1940, in enacting a bill to amend the 1929 Act, *see* Pub. L. No. 76-481, Congress again rejected a proposal to exclude noncitizens from apportionment. *See* H.R. Rep. No. 1787, at 1 (1940) (Ex. 55) (committee report showing proposed exclusion of noncitizens). As Representative Emanuel Celler explained in opposing the proposal:

> For 150 years we have included aliens in the count. We cannot, by mere resolution of this body or the adjoining body, change that constitutional requirement. If you strike out aliens you have parted with a principle of government upon which the fathers agreed some 150 years ago…When we use the word "persons" we include all peoples.

Cong. Rec. H4372 (Apr. 11, 1940); 86 Cong. Rec. at 4384-86 (voting 209-23 to strike exclusion).

And in 1980, a bill to exclude undocumented immigrants from the apportionment base failed after New York Senator Jacob Javits explained that there is no plausible way to construe the Constitution's words as meaning "anything other than as described in Federalist papers, the

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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 al Affairs* (*1980 Census*), 96th Cong. 10 (1980).

The Executive Branch has likewise consistently maintained that the Constitution requires counting all persons, regardless of immigration status, in the apportionment base. For example, in *FAIR v. Klutznick*, the Department of Justice, on behalf of the President, Secretary of Commerce, and Director of the Census Bureau, urged a district court to reject claims demanding exclusion of undocumented immigrants from the apportionment base. Defs.' Mem. of Points & Authorities in Support of Mot. to Dismiss or for Summary Judgment, No. 79-3269 (D.D.C.), *reprinted in 1980 Census*, *supra*, at 125-156. The government explained that "the plain language of the Constitution, as well as the intent of its framers, establishes that all inhabitants, including illegal aliens, must be enumerated for the purpose of apportioning Representatives." *Id.* at 131. Similarly, the Department of Justice's Office of Legislative Affairs has opined that the Constitution "require[s] that inhabitants of States who are illegal aliens be included in the census count." Letter from Assistant Attorney Gen. Carol T. Crawford to Honorable Jeff Bingaman (Sept. 22, 1989), in 135 Cong. Rec. S22,521 (daily ed. Sept. 29, 1989).

Defendants have acknowledged that the decennial enumeration that necessarily determines the apportionment base must count *all persons living* in the United States, without any exclusions. For example, on March 14, 2019, Secretary Ross testified under oath during a congressional committee hearing that "[t]he constitutional mandate, sir, for the census is to try to count *every person residing* in the U.S. at their place of residence on the dates when the census is conducted." *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 31 (Mar. 14, 2019) (emphasis added); *see id.* ("We intend to try to *count every person* taking all necessary

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actions to do so." (emphasis added)). During a congressional committee hearing in February 2020, Census Bureau Director Dillingham testified that the Bureau will "*count everyone*, wherever they are living," including undocumented immigrants. *Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 12 (Feb. 12, 2020) (emphasis added).

In multiple filings in this Court, many of the Defendants here repeatedly admitted that the Constitution requires enumerating every person residing in the United States, no matter their immigration status, for inclusion in the apportionment base. *See, e.g.*, *New York v. Dep't of Commerce*, Defs.' Post-Trial Proposed Findings of Fact and Conclusions of Law 1, 18-CV-2921 (JMF) (S.D.N.Y. Nov. 21, 2018), ECF No. 546 ("Constitution requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." (internal citations omitted)).[14]

And, under a final rule adopted for the 2020 census, the Census Bureau has already decided to count undocumented immigrants for apportionment purposes. *See Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5533 (Feb. 8, 2018).

Defendants' attempt to reverse course at the last minute after the actual enumeration is already underway, and to exclude undocumented immigrants from the apportionment base for the first time in our country's history, reflects a radical break from the consistent understanding and practice of the federal government for more than two centuries. There is simply no textual or historical support for this abrupt break in one of our country's foundational principles.

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[14] *See also, e.g.*, *New York v. Dep't of Commerce*, Memo. of Law in Support of Defs.' Mot. to Dismiss 25, 18-CV-2921 (JMF) (S.D.N.Y. May 25, 2018), ECF No. 155 ("Constitution supplies a simple judicial standard for determining the constitutionality of [Census Bureau] practices—the Secretary must perform *a person-by-person headcount*" (emphasis added)).

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5. Defendants do not have any "discretion" to exclude undocumented immigrants from the apportionment base.

Contrary to the President's Memorandum, the Executive Branch does not have "discretion" to categorically exclude undocumented immigrants from the "whole number of persons in each State" based solely on their immigration status, without any regard to their physical residence here. 85 Fed. Reg. at 44,679.

The Memorandum reasons that apportionment should be based only on the number of "inhabitants" of each State, and that the President purportedly has discretion to deem undocumented immigrants who reside here as not "inhabitants." *Id.* But even if being an "inhabitant" were the relevant criterion, millions of undocumented immigrants who live in this country are indisputably inhabitants because they live here, many for years or even decades. An "inhabitant" is "a person . . . that lives in a particular place." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/inhabitant. The President has no discretion to declare that undocumented residents of this country are not "inhabitants."

The text of the Constitution and an unbroken line of history also foreclose any discretion here. The Supreme Court has held that "[u]sual residence" is "the gloss given the constitutional phrase 'in each State'" in Section 2 of the Fourteenth Amendment—meaning all persons whose "usual residence" is in the United States "must be included in the enumeration of the population and the apportionment of House seats." *Franklin v. Massachusetts*, 505 U.S. 788, 805 (1992). And "usual residence" has always been the criterion for enumeration and apportionment since "the first enumeration Act." *Id.* Conversely, the Framers specifically considered and rejected the notion that a person's legal status—including voter, citizenship, or immigration status—could ever override their physical residence in the United States and result in their exclusion from the apportionment base. *See* 85 Fed. Reg, at 44,680. Defendants lack any authority to

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exclude undocumented immigrants who maintain their usual residence in the United States from the apportionment.

The Memorandum's conclusory attempts to support its invocation of "discretion" rely on inapposite examples. For example, the Memorandum asserts that noncitizens who are only temporarily in the United States for a vacation or a business trip are not included in the decennial enumeration used for apportionment even though they may be "physically present." 85 Fed. Reg. at 44,679. But temporary visitors are not included in the apportionment base precisely because the United States is not their "usual residence." *See* 83 Fed. Reg. at 5533. By contrast, the millions of undocumented immigrants whom Defendants seek to exclude from apportionment are not merely "physically present" as a fleeting matter but rather are residents here—many for years or even decades. The policy of excluding temporary visitors provides no support for Defendants' attempt to exclude actual residents of this country who happen to be undocumented immigrants.

Defendants also point to the Secretary of Commerce's decision, "at various times, to include" in the apportionment federal military and civil personnel who are not physically present in this country but are temporarily serving overseas. 85 Fed. Reg. at 44,679. But the policy of including overseas federal personnel takes as a given the principle that all persons living in the United States must be counted for apportionment purposes, and simply extends that principle to persons who can be deemed to maintain a "usual residence" in the country—because they have "retained their ties to the States"—even though they have been "*temporarily* stationed abroad" by the government. *Franklin*, 505 U.S. at 806 (emphasis added). In no sense does this inclusionary policy to *include* persons who are not currently physically present in their home

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States authorize Defendants to *exclude* persons who indisputably reside here and thus are part of the "whole number of persons in each State." U.S. Const. amend. XIV.

B. Apportioning Representatives based on numbers other than the actual enumeration from the decennial census is also unconstitutional.

The Presidential Memorandum violates the Constitution for a second, independent reason: it requires the use of data other than the "actual Enumeration" of the population ascertained by the decennial census to apportion Representatives. The actual enumeration in the 2020 census indisputably will include undocumented immigrants, and the Constitution requires Defendants to rely solely on this "actual Enumeration" for congressional apportionment. The subtraction of undocumented immigrants to create an apportionment base that is different from the population included in the actual enumeration violates this constitutional requirement.

Article 1, Section 2 mandates that House seats be allocated based on the "numbers" determined by the "actual Enumeration" of the decennial census. U.S. Const. art 1, § 2. While the Executive Branch may maintain some discretion over the manner of conducting the census, *see Franklin*, 505 U.S. at 799; *Utah v. Evans*, 536 U.S. 452 (2002), once the decennial census determines the "actual Enumeration," Defendants must use those numbers—and only those numbers—to apportion House seats. As the Supreme Court has explained, "the Constitution provides that the results of the census *shall be used* to apportion the Members of the House of Representatives among the States." *Wisconsin*, 517 U.S. at 5 (emphasis added). And "[t]he decennial census is *the only census* that is used for apportionment purposes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (quotation marks omitted) (emphasis added).

The Framers required that apportionment be based solely on the numbers from the actual enumeration to provide a fixed rule "that would limit political chicanery." *Utah*, 536 U.S. at 500

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(Thomas, J., concurring in part and dissenting in part). The Framers' "principal concern was that the Constitution establish a standard resistant to manipulation." *Id.* at 503. George Mason described having a "permanent and precise standard as essential to fair representation," because absent such a standard, "those who have power in their hands will not give it up while they can retain it." *Id.* at 502 (quoting The Founders' Constitution 102-03 (P. Kurland & R. Lerner eds. 1987)). Roger Sherman agreed that "the rule of revising the Representation ought to be fixt by the Constitution." *Id.* (quoting The Founders' Constitution 104). And Alexander Hamilton, writing about the Enumeration Clause's apportionment of direct taxes among the States, explained that "*an actual Census or enumeration of the people must furnish the rule*," so as to "shut[] the door to partiality or oppression." The Federalist No. 36 at 220 (emphasis added).

For the 2020 census, the actual Enumeration will continue to include undocumented immigrants. Defendant Dillingham recently confirmed in congressional testimony that the Memorandum "does not change the Census Bureau's plans for field data collection across the nation," and that the Bureau will "continue full steam ahead with . . . counting every person," including undocumented immigrants Prepared Statement of Dr. Steven Dillingham Before the House Oversight and Reform Committee (July 29, 2020).[15] Dillingham reaffirmed that the Census Bureau will continue to adhere to its Residence Rule for the 2020 census, *see id.*, which requires enumerating undocumented immigrants "at the U.S. residence where they live and sleep most of the time." 83 Fed. Reg. at 5533. And Defendants confirmed to this Court in this case that "[t]he Census Bureau is conducting a complete enumeration of the total population and

[15] https://docs.house.gov/meetings/GO/GO00/20200729/110948/HHRG-116-GO00-Wstate-DillinghamS-20200729.pdf.

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nothing in the [Presidential Memorandum] alters that counting process." Joint Letter 9, *New York v. Trump*, 20-CV-5770 (JMF), ECF No. 37 (S.D.N.Y. filed Aug. 3, 2020).[16]

The Presidential Memorandum, however, directs the use of population totals excluding undocumented immigrants for apportionment—which are different from the actual Enumeration. To implement the Memorandum, Defendants would need to take the actual Enumeration numbers and subtract some estimate of the undocumented immigrants who live in each State, using administrative data or statistical models from sources other than the decennial actual Enumeration. *See* 85 Fed. Reg. at 44,679-80. Defendants would then use the resulting figures—rather than the actual Enumeration numbers—as the apportionment base. *See id.* Defendants' recent submission to this Court confirmed that, under the Memorandum, "an apportionment number . . . will be chosen by the President after the census is complete." Joint Letter 5, *New York v. Trump*, 20-CV-5770 (JMF), ECF No. 37 (S.D.N.Y. filed Aug. 3, 2020). In other words, the President will "choose" a "number" for the apportionment base that differs from the "complete enumeration of the total population." *Id.* at 9.

The Constitution prohibits Defendants from apportioning seats in this manner. The President does not have "discretion" to add to, subtract from, or otherwise alter the numbers of persons actually enumerated through the decennial census to "choose" a separate apportionment base of his own liking. As the Census Bureau has recognized for decades, there is unbroken

[16] If Defendants assert, contrary to Dillingham's congressional testimony, the Residence Rule, and Defendants' recent submission, that the "actual Enumeration" is the numbers derived after subtracting undocumented immigrants from the 2020 census count, that also would violate the Enumeration Clause. The Enumeration Clause prohibits Defendants from subtracting enumerated people out of the actual Enumeration numbers, and it certainly prohibits Defendants from doing so based on statistical estimates that rely on sampling and administrative data from outside agencies. *See, e.g.*, *U.S. House of Representatives*, 525 U.S. at 346-47 (Scalia, J., concurring in part) ("an 'enumeration' requires an actual counting").

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"historical precedent of using the actual Enumeration for purposes of apportionment" rather than any other population count. *U.S. House of Representatives*, 525 U.S. at 340. The Constitution's fixed "rule" bars the President from using an apportionment base that differs from the actual Enumeration numbers. The Federalist No. 36 at 220.

Indeed, Defendants' scheme to deviate from the actual Enumeration numbers in shaping political power for the next decade represents precisely the type of "political chicanery" and "manipulation" that the Framers prevented by adopting the Enumeration Clause. *Utah*, 536 U.S. at 500, 503 (Thomas, J., concurring in part and dissenting in part). The Memorandum makes no secret that Defendants seek to exclude undocumented immigrants from the apportionment base for political reasons. The Memorandum explicitly seeks to prevent certain States from being "rewarded with greater representation in the House of Representatives," and even singles out a particular state—California—whose political power Defendants wish to reduce. 85 Fed. Reg. at 44,680. The Framers foresaw that leaders could seek to manipulate congressional apportionment for their own political benefit, and they guarded against such abuse by mandating that apportionment be determined by the actual Enumeration of the population ascertained through a decennial census, and nothing else.

IV. The Memorandum is *ultra vires* under the statutory scheme Congress enacted to implement the required decennial census and reapportionment of House seats.

The President's Memorandum also violates statutory provisions Congress enacted to implement those constitutional requirements. *See* 13 U.S.C. § 141(a), (b); 2 U.S.C. § 2a. The Memorandum is *ultra vires* under these statutes in at least three ways.

A. The Memorandum violates the statutory requirements to count the total population, and to report and use that total for apportionment purposes.

Congress enacted a statutory scheme directing that the whole population of the States—including undocumented immigrants who reside here—must be counted in the decennial census

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and then used to apportion representatives. 13 U.S.C. § 141; 2 U.S.C. § 2a. As Congress explained in enacting predecessors to these two provisions in a single statute,[17] "the functions served by them interlock," because "there is but one basic constitutional function served by the census. It is to provide an enumeration of the people for the purpose of redistributing congressional representatives proportioned thereto." S. Rep. No. 71-2, at 2 (1929) (Ex. 53).

As codified at 13 U.S.C. § 141(a), the Census Act instructs that the Secretary of Commerce "shall . . . take a decennial census of population . . . ." Subsection (b) then specifies that "[t]he tabulation of total population by States under subsection (a) . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b); *see also* Act of June 18, 1929, § 2, 46 Stat. 21, 21 (requiring same tabulation). These provisions together require that there be a "census of population" under subsection (a), that this census include a "tabulation of total population by States as required for" apportionment, and that this tabulation then be provided in a report to the President.

In turn, 2 U.S.C. § 2a(a) directs the President to provide Congress an apportionment report that is based solely on the census's tabulation of population and application of a mathematical apportionment method to that result. As the statute provides, "the President shall transmit to the Congress a statement showing the *whole number of persons in each State*, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent *decennial census of the population*, and 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* . . . ." 2 U.S.C. § 2a (emphases added); *see also* Act

[17] *See* Act of June 18, 1929, §§ 2, 22.

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of June 18, 1929, § 2, 46 Stat. 21, 21; Pub. L. No. 77-291, § 1 (amending provision of 1929 Act to require use of "equal proportions" method). The "method of equal proportions" is a method of apportionment based on each State's population designed to minimize disparities in "population per Representative" among States. 71 Cong. Rec. at 4965 (Mar. 2 1929) ("Memorandum on the Method of Equal Proportions" by Professor Edward Huntington noting unanimous adoption of method by Advisory Committee of the Census); 67 Cong. Rec. at 7078 (Apr. 7, 1926) (Advisory Committee report describing method as providing "an apportionment in which the ratios between the representation and the population of the Several States are as nearly alike as possible"). The Department of Justice has recognized that the method of equal proportions relies on each State's population. Br. for Appellants, *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992), 1992 WL 672939, at *9-*11 ("Under all of the methods, the formula for establishing each State's priorities has as its numerator the population of the State.").

By requiring the exclusion of undocumented immigrants from the statutory phrases "total population" and "whole number of persons in each State," the Memorandum directs the President and the Secretary of Commerce to perform unlawful, *ultra vires* actions.

The Commerce Secretary is not empowered to provide the President with information "as required for the apportionment" other than a "tabulation of *total population*." 13 U.S.C. § 141(b) (emphasis added). And the President is not empowered to exclude undocumented immigrants from "the whole number of persons in each State" or from the apportionment numbers in his apportionment report to Congress. 2 U.S.C. § 2a(a). The reason is simple: undocumented immigrants are persons. As a matter of plain language, the word "person" in § 2a makes no distinction based on citizenship or immigration status. *See also supra* Part III.A. (same discussion in context of Fourteenth Amendment). At no point has Congress had trouble

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distinguishing among persons, citizens, and noncitizens when it wishes to do so—and it certainly had no such trouble in 1929 when §§ 141 and 2a were initially enacted. *See, e.g.*, Pub. L. No. 71-962, § 6(b) (prohibiting "alien" from "being admitted to citizenship" without being "a person of good moral character" as shown by, *inter alia*, testimony of two "citizens of the United States"). Similarly, the single exception reflected in § 2a's text—"Indians not taxed"—suggests no other exclusions were intended. *See Greene v. United States*, 79 F.3d 1348, 1355 (2d Cir. 1996) ("mention of one impliedly excludes others").

Congress is also "presumed to legislate with familiarity of the legal backdrop for its legislation." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 114 (2d Cir. 2017). That backdrop speaks volumes. Congress adopted the "whole number of persons" statutory language in 1929 (and again in 1941) against (1) its own unbroken legislative practice to count noncitizens, including undocumented immigrants, for apportionment purposes[18]; and (2) Supreme Court precedent holding that "person" in the Fourteenth Amendment includes undocumented immigrants. *See supra* Part III.A. This further shows that the statute requires including such individuals in apportionment. When "Congress used the materially same language [in a statute] it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (unanimous court on this point); *see also New York v. U.S. Dep't of Homeland Sec.*, __ F.3d __, 2020 WL 4457951, at *21 (2d Cir. Aug. 4, 2020) (Congress "ratified the settled meaning" of a term in immigration law "[i]n light of the judicial, administrative, and legislative treatments" of that term from 1882 to 1996).

[18] For the vast majority of the nation's history, Congress apportioned seats in the House by statute enacted shortly after the decennial census. *See* Br. for Appellants, *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992), 1992 WL 672929, at *4-*15.

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The Memorandum also contradicts Congress's unambiguous rejection of proposals to exclude noncitizens from the apportionment base. As discussed above, in enacting the 1929 Act in which 2 U.S.C. § 2a originated, both the Senate and House considered and rejected amendments to exclude noncitizens from the "whole number of persons in each State" for apportionment purposes.[19] Congress again rejected such a bill in 1940, and again in 1980. *See supra* Part III.A.4. These votes show that Congress understood that the ordinary meaning of the phrase "persons in each state" included noncitizens: "at the time of the [Fourteenth Amendment's adoption] and since, an alien was and has been a 'person.'" 71 Cong. Rec. at 1821 (May 23, 1929). They also show that Congress understood that its own historical legislative practice had "been uniformly in favor of inclusion of aliens," *id.* at 1822, such that enactment of the "whole number of persons" language would continue that unbroken practice.

The Census Bureau's longstanding interpretation of its statutory obligations further confirms that undocumented immigrants residing in the United States are part of the enumerated population used to apportion House seats. "Congress is presumed to be aware of an administrative . . . interpretation of a statute." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also New York*, __ F.3d __, 2020 WL 4457951, at *21. On February 8, 2018, after notice-and-comment rulemaking, the Census Bureau promulgated its "Residence Rule" for the 2020 census, which is used to "determine where people are counted during each decennial census" in order "to apportion the seats in the U.S. House of Representatives among the States." *Final 2020 Census Residence Criteria and Residence Situations*, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018). Its

[19] *See* 71 Cong. Rec. 2065 (vote on amendment by Sen. Sackett fails, 29-48) (1929); *id.* at 2360-63 (House adopts alienage exclusion as amendment to section 22 on June 4, 1929); *id.* at 2448-2445 (Rep. Tilson of Connecticut offers substitute for section 22 of the bill without alienage exclusion, House by vote of 202-129 sustains ruling of the chair against point of order against Tilson amendment, House adopts Tilson amendment 212-102, and House passes bill).

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purpose is "to ensure that the concept of usual residence is interpreted and applied, consistent with the intent of the Census Act of 1790, which was authored by a Congress that included many of the framers of the U.S. Constitution and directed that people were to be counted at their usual residence." *Id.* at 5526.

Under the Residence Rule, "[c]itizens of foreign countries living in the United States" must be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The Census Bureau elaborated that the "Census Bureau is committed to counting every person in the 2020 Census," including citizens of foreign countries living in the United States. *Id.* at 5526. And it considered comments "express[ing] concern about the impact of including undocumented people in the population counts for redistricting because these people cannot vote," *id.* at 5530, but declined to make any changes to its residence criteria and indicated that it "will retain the proposed residence situation guidance for foreign citizens in the United States." *Id.*

The Memorandum attempts to manufacture ambiguity on whether undocumented immigrants "inhabit" a State such that they constitute a "person[] in each State" for constitutional purposes. 85 Fed. Reg. at 44,679. But there is no such ambiguity: the phrase "whole number of persons in each State," as used in 2 U.S.C. § 2a, has always been understood to include people who reside in a particular State regardless of alienage or immigration status. *See supra* Part III.A. Congress has repeatedly rejected measures to exclude aliens from § 2a—measures that would have made little sense if § 2a already excluded categories of aliens. Moreover, it would be inconsistent with § 2a—under which the President has a ministerial role to report the census's count of total population and mandated to use a method designed to minimize per-district population disparities—to grant him discretion to exclude whole classes of persons.

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B. The Memorandum violates the Census Act by producing apportionment figures that are not based solely on the decennial census.

The Memorandum's reliance on non-census data to determine the number of undocumented immigrants to be removed from the apportionment base violates the requirement under 2 U.S.C. § 2a to use census data only.

Section 2a is clear that both the "whole number of persons" and the apportionment data must be ascertained from the decennial census.[20] The provision specifies that this number must be "ascertained under the . . . decennial census of the population." In *Franklin v. Massachusetts,* 505 U.S. 788 (1992), the Supreme Court affirmed that "Section 2a . . . expressly require[s] the President to use . . . the data from the 'decennial census.'" *Id.* at 797.[21]

The broader statutory scheme makes clear that the apportionment data reported by the President must come from the census alone. The Census Act specifies that "[t]he tabulation of total population by States" is "required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b). As the Senate Report for the 1929 bill explained, "[t]he census would be taken in November, 1929. One year later, *with these figures in*

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[20] The President's statement must "show[] the whole number of persons in each State . . . as ascertained under the seventeenth and each subsequent decennial census of the population." 2 U.S.C. § 2a. Apportionment must be based on "the method of equal proportions," relying on that data. *Id.*

[21] *Franklin* held that certain elements of 2 U.S.C. § 2a(a) are non-ministerial, but the Court appeared to limit those to circumstances in which the Secretary of Commerce has exercised policy judgment. *See* 505 U.S. at 799 ("§ 2a does not curtail the President's authority to direct the Secretary in making policy judgments that result in 'the decennial census'; he is not expressly required to adhere to the policy decisions reflected in the Secretary's report."). Whatever those non-ministerial duties may be, *Franklin* is equally clear that use of the census data and the calculation of apportionment figures are ministerial. *Id.* at 797 ("Section 2a does not expressly require the President to use the data in the Secretary's report, but, rather, the data from the "decennial census."); *id.* at 799 (the President's apportionment calculation is of a "ministerial nature").

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hand, the President would report the census figures, together with a table showing how, *under these figures*, the House would be apportioned." S. Rep. 71-2 at 4 (emphases added) (Ex. 53).

The President's use of the census's count of the whole number of persons in each State, and application of the chosen mathematical method (equal proportions), are not discretionary matters. "The Department of Commerce counts the people (as it always has done)," and "the President reports upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but one mathematical answer." S. Rep. 71-2, at 4-5 (Ex. 53); *see also* H.R. Rep. 70-2010, at 7 (official providing report "is left with no discretionary power" and must use "without deviation, the population of each State" as reported in census) (Ex. 54). The Supreme Court has made equally clear that, under 2 U.S.C. § 2a, the President must use census data and that an apportionment based on that data is "admittedly ministerial." *Franklin*, 505 U.S. at 797, 799.

The Supreme Court has further confirmed that the President's apportionment report must be based on the population figures from the census, noting that the Apportionment and Census Acts "mandat[e] a population count that will be used to apportion representatives." *Dep't of Commerce*, 139 S. Ct. at 2568-69; *see also U.S. House of Representatives*, 525 U.S. at 321-22 ("Using this information [from the Census], the President must then "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled.").

The Department of Justice has also historically recognized that the apportionment must be based on the total population figures produced by the census. Reply Br. for the Federal Appellants at 15, *Franklin v. Massachusetts* ("[I]t is true that the method of equal proportions calls for application of a set mathematical formula to the state population totals produced by the

census"); Tr. of Oral Argument at 12, *Franklin,* 505 U.S. 788 (Deputy Solicitor General Roberts) ("The law directs [the President] to apply, of course, a particular mathematical formula to the population figures he receives . . . ."); *id.* at 12("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."); *id.* at 13 ("I think under the law he is supposed to base his calculation on the figures submitted by the Secretary.").

The President's Memorandum violates these requirements. To exclude undocumented immigrants from the apportionment base, *see* 85 Fed. Reg. at 44,680, the President will necessarily have to rely on information that is not contained within the census, because the 2020 census questionnaire is not gathering information concerning citizenship or immigration status. *See, e.g.*, Order, *New York v. U.S. Dep't of Commerce*, 18-CV-2921 (JMF) (S.D.N.Y. Aug. 7, 2019), ECF No. 653 (permanently enjoining the inclusion of a citizenship question on the 2020 decennial census questionnaire).

Further, the Memorandum itself concedes that it will rely on information other than that obtained by the census. The Memorandum distinguishes between the enumeration information gathered by the census under the governing Residence Rule, and the information the President will use to exclude undocumented immigrants from the census count of whole persons:

> [T]he Secretary shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out the policy set forth in section 2 of this memorandum. The Secretary *shall also* include in that report information tabulated according to the methodology set forth in [the Residence Rule].

85 Fed. Reg. at 44,680 (emphasis added). The Memorandum additionally indicates that other "data on illegal aliens . . . relevant for the purpose of conducting the apportionment" may be available as a result of Executive Order 13,880, in which the President "instructed executive

departments and agencies to share information with the Department of Commerce, to the extent permissible and consistent with law, to allow the Secretary to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country." 85 Fed. Reg. at 44,680.

Simply put, the Memorandum violates statutory requirements by requiring the reporting to the President and the subsequent Presidential use of non-census data to calculate a whole number of persons in each State that is different from census results, and to apportion seats in Congress according to that latter figure.

C. The Memorandum violates 2 U.S.C. § 2a by producing apportionment figures that are not based solely on a ministerial calculation.

The President is required to report an apportionment calculation "by the method known as the method of equal proportions." 2 U.S.C. § 2a. In *Franklin*, the Supreme Court made clear that the President's apportionment calculation is of a "ministerial nature." *See Franklin*, 505 U.S. at 799. *Franklin* noted that the Senate Report for the bill that presaged 2 U.S.C. § 2a, states that the President is to report "upon a problem in mathematics which is standard, and for which rigid specifications are provided by Congress itself, and to which there can be but *one mathematical answer*." *Id.* (quoting S. Rep. No. 2, 71st Cong., 1st Sess., at 4–5) (emphasis added).

The legislative history confirms the point. In 1920, for the first time, Congress failed to pass a reapportionment act. *Montana*, 503 U.S. at 451–52. Accordingly, in 1929, in passing the modern precursor to 13 U.S.C. § 141 and 2 U.S.C. § 2a, Congress ensured "an automatic reapportionment through the application of a mathematical formula to the census." *Franklin*, 505 U.S. at 809 (Stevens, J., concurring in part and concurring in the judgment). "The automatic connection between the census and the reapportionment was the key innovation of the Act." *Id.*

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In 1941, the Act was modified to change the allocation formula to the current method of equal proportions. *See id.* at 809 n.5 (citing *Montana*, 503 U.S. at 451–52 & n.25).

Indeed, congressional debate makes clear that Congress intended to give the President no discretion in how reapportionment figures would be calculated. The sponsor of the bill, Senator Vandenburg, explained that the President had no discretion in such a calculation and that "as a matter of indisputable fact, th[e] function served by the President is as purely and completely a ministerial function as any function on earth could be." 71 Cong. Rec. 1858 (1929); *see also supra* IV.B. (noting similar statements in committee reports).

As discussed *supra*, the Memorandum establishes a policy under which the President will perform additional calculations beyond those set forth by the method of equal proportions in order to derive an apportionment figure that excludes undocumented immigrants. 85 Fed. Reg. at 44,680 ("[I]t is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act."). But Congress designed a system with only "one mathematical answer" to the question of apportionment, S. Rep. 71-2, at 4-5 (Ex. 53). By altering Congress's required apportionment computation to add calculations not specified by 2 U.S.C. § 2a, the Memorandum causes the President to violate his ministerial duty to report apportionment figures under the "rigid specifications" provided by the method of equal proportions. S. Rep. No. 71-2, at 4–5 (Ex. 53). Such calculations therefore violate the "automatic connection between the census and the reapportionment" that Congress established. *Franklin*, 505 U.S. at 809 (Stevens, J., concurring in part and concurring in the judgment).

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D. This Court has equitable authority to correct the Presidential Memorandum's *ultra vires* mandates.

Because the Memorandum requires Defendants Trump and Ross to act beyond the plain scope of their statutory authority, the equitable jurisdiction of this Court is available to correct this *ultra vires* action and provide redress to Plaintiffs.

The Supreme Court has long recognized that federal courts have inherent equitable authority to grant relief to enjoin *ultra vires* action, such as that ordered by the Memorandum, even in the absence of an express statutory provision. The Court most recently reaffirmed this authority in *Armstrong v. Exceptional Child Center*, which explained that federal courts may grant injunctive relief absent a statutory cause of action "with respect to violations of federal law by federal officials." 575 U.S. 320, 326-27 (2015). This inherent equitable authority, the Court noted in *Armstrong*, has been recognized for centuries "and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 327; *see also generally Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110 (1902); *Carroll v. Safford*, 44 U.S. 441, 463 (1845).

The core purpose of inherent equitable authority is not just to provide redress for individuals whose statutory or constitutional rights are violated, but also to ensure the proper separation of powers and require "the executive to obey [Congress's] statutory commands." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986); *see also Leedom v. Kyne*, 358 U.S. 184, 191 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.").

The modern doctrine of *ultra vires* review provides inherent, nonstatutory review for executive action in excess of statutory authority. *See, e.g.*, *Mountain States Legal Found. v. Bush*, 306 F. 3d. 1122, 1136 (D.C. Cir. 2002) ("the Supreme Court has indicated generally that

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review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority"); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996) ("When an executive acts *ultra vires,* courts are normally available to reestablish the limits on his authority"). Such review exists independently from the Administrative Procedure Act ("APA"), and the APA does not restrict or "repeal the review of *ultra vires* actions." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see also Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (finding equitable cause of action "which exists outside of the APA"), *rev'd on other grounds*, 138 S. Ct. 2392 (2018); *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014) ("the absence of a cause of action for judicial review under the APA does not necessarily foreclose all judicial review"); *Reich*, 74 F.3d at 1326-27 (engaging in *ultra vires* review where APA claim not pled).

Further, courts have consistently acknowledged that *ultra vires* review extends to review of actions taken by the *President*, not just subsidiary executive branch actors. *See, e.g.*, *Hawaii*, 878 F.3d at 682-83 (finding equitable cause of action "allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority"); *Mountain States Legal Found.*, 306 F.3d at 1136 (finding equitable review generally available to determine whether presidential executive memoranda exceed statutory authority); *Reich*, 74 F.3d at 1327-28 (finding, under equitable review, that presidential executive order violated National Labor Relations Act). Indeed, the Supreme Court has often reviewed whether presidential actions comply with congressional statutes without specifying or identifying a cause of action. *See, e.g.*, *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (reviewing presidential actions relating to Haitian migrants for compliance with the INA without discussing cause of action); *Dames &*

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Moore v. Regan (453 U.S. 654 (1981) (upholding executive orders, including their conformity with various statutes, without discussing causes of action).

Ultra vires review may be inappropriate in two circumstances, but neither exception applies here. First, inherent equitable authority is unwarranted where Congress has demonstrated an "intent to foreclose" equitable relief by providing alternate enforcement mechanisms and because the statute is judicially unadministrable. *See Armstrong*, 575 U.S. at 327-29. Here, there is no alternate mechanism for enforcing the statutory provisions at issue, and the statutory mandate and remedy—to include undocumented immigrants with all other people in the apportionment base—is eminently administrable.

Second, equitable review may be inappropriate "[w]here a statute . . . commits decisionmaking to the discretion of the President." *Dalton v. Specter*, 511 U.S. 462, 477 (1994). But that is plainly not the case here, where Congress has mandated that the Secretary and the President perform specifically prescribed actions without any meaningful discretion. Indeed, the Supreme Court has held that by "mandating a population count that will be used to apportion representatives" under 13 U.S.C. § 141(b) and 2 U.S.C. § 2a, Congress did *not* commit unreviewable discretion the executive. *Dep't of Commerce*, 139 S. Ct. at 2568-69.

It is beyond any question that the Memorandum requires action in excess of the authority granted by statute to the President and the Commerce Secretary. As such, this Court has ample power to grant the requested relief to ensure compliance with the law.

V. Alternatively, a preliminary injunction is warranted to prevent irreparable harm.

In the alternative, Plaintiffs are entitled to a preliminary injunction on their claims that the Memorandum violates the Constitution and federal law. Plaintiffs are likely to succeed on the merits of their claims that the decision to exclude undocumented immigrants from the apportionment base violates the Constitution and federal law, and that the Presidential

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Memorandum violates Article I and Section 2 of the Fourteenth Amendment and violates the Census Act, for the reasons set out in Part III and Part IV above.

As this Court has recognized, "[a] showing of irreparable harm 'is the single most important prerequisite for the issuance of a preliminary injunction.'" *XL Specialty Ins. Co. v. Level Glob. Inv'rs, L.P.*, 874 F. Supp. 2d 263, 270 (S.D.N.Y. 2012) (quoting *Faiveley Transport. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009)). Plaintiffs need only show a "*threat* of irreparable harm, not that irreparable harm already [has] occurred." *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010).

Plaintiffs will suffer irreparable and imminent harm because the Memorandum discourages immigrant households from responding to the 2020 census. The well-publicized Memorandum will produce a chilling effect on response rates by sowing confusion, mistrust, and fear among immigrant households about the consequences of responding to the census. The resulting decline in response rates will both degrade the quality of census data—thereby compromising the Governmental Plaintiffs' policy and planning decisions that rely on that data—and result in an ultimate undercount of immigrant communities that will reduce the federal funds flowing to those communities.[22] Plaintiffs will also suffer imminent, irreparable harm because the Memorandum will dilute the political power of Plaintiffs' constituents.

[22] This Court may take judicial notice of the evidentiary record from the related case of *State of New York v. Department of Commerce*, 18-CV-2921 (JMF), under the "established . . . approach that permits courts in subsequent related cases to rely upon the evidence presented in earlier litigation . . . to reach their own, independent findings of fact in the cases before them." *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1, 6 (D.D.C. 2011); *see Hake v. Citibank, N.A.*, No. 19-MC-125 (JGK), 2020 WL 1467132, at *5 (S.D.N.Y. Mar. 26, 2020) ("[T]he court could 'take judicial notice of the evidentiary record in another similar case and, from that, make certain factual findings that obviate the need for Plaintiffs to re-present the same evidence.") (citation, brackets, and internal quotation marks omitted).

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A. The Presidential Memorandum will deter immigrants and their households from responding to the 2020 census.

The Memorandum, and Defendants' corresponding public statements, are already predictably deterring participation in the ongoing decennial census and undermining the Census Bureau's efforts to count immigrants and their families. Just as adding a citizenship question to the decennial census would have made non-citizen and Hispanic households "unlikely to respond (or to give a complete response) to in-person NRFU enumerators," *New York*, 351 F. Supp. 3d at 585, so too will the exclusion of undocumented immigrants from the apportionment base make immigrant households less willing to respond to the census or to NRFU enumerators. Barreto Decl. ¶ 85 (Ex. 56).

Defendants' decision to exclude undocumented immigrants from the apportionment base sends a clear message that this community does not count and should be left out of the democratic process. Bird Decl. ¶ 9 (Ex. 9); Choi Decl. ¶¶ 16-18 (Ex. 14); Colon Decl. ¶ 11 (Ex. 16); Cullinane Decl. ¶ 7 (Ex. 17); Espinosa Decl. ¶ 11 (Ex. 18); Khalaf Decl. ¶¶ 12 (Ex. 26); Matos Decl. ¶ 11 (Ex. 30); Mostofi Decl. ¶ 8 (Ex. 34); Oshiro Decl. ¶¶ 12-13 (Ex. 36); Sarmiento Decl. ¶ 5 (Ex. 42); Seon Decl. ¶¶ 13-14 (Ex. 43); Soto Decl. ¶ 12 (Ex. 45); Torres Decl. ¶ 19 (Ex. 47). This message, and its import, is widely known across immigrant communities, particularly those that consume Spanish-language media. Barreto Decl. ¶ 14 (Ex. 56); Oshiro Decl. ¶ 12 (Ex. 36); Torres Decl. ¶ 18 (Ex. 47). The Memorandum undercuts Plaintiffs' messaging that "everyone counts" and effectively discourages immigrant households from responding to the census at all. Alvarez Decl. ¶ 11 (Ex. 1); Baldwin Decl. ¶ 8 (Ex. 4); Bird Decl. ¶ 12 (Ex. 9); Broughton Decl. ¶ 6 (Ex. 10); Brower Decl. ¶ 11 (Ex. 11); Bysiewicz Decl. ¶ 8 (Ex. 12); Choi Decl. ¶¶ 16-18 (Ex. 14); Colon Decl. ¶ 7 (Ex. 16); Espinosa Decl. ¶¶ 7, 12-13 (Ex. 18); Matos Decl. ¶ 9, 12 (Ex. 30); Murray Decl. ¶ 5 (Ex. 35); Oshiro Decl. ¶¶ 12-13 (Ex. 36);

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Sarmiento Decl. ¶ 5 (Ex. 42); Seon Decl. ¶¶ 9, 14 (Ex. 43); Sivongxay Decl. ¶ 12 (Ex. 44); Soto Decl. ¶ 6 (Ex. 45); Torres Decl. ¶¶ 12, 13, 19 (Ex. 47); Barreto Decl. ¶¶ 33, 54 (Ex. 56). As the Chief Demographer for New York City has explained, the Memorandum "discredits the essential message that everyone's response matters and makes an already fearful group more apprehensive about the perceived risks associated with responding [to the census]." Salvo Decl. ¶ 10 (Ex. 41). As Dr. Matthew A. Barreto, a Chicano/a Studies professor with decades of experience in public opinion research in the Latino community, writes, the Memorandum both reduces the benefits and raises the risks of Census participation for undocumented immigrants because "the July 21 PM states they won't count, and there is now a risk of their information being linked to immigration records and facing immigration enforcement." Barreto Decl. ¶ 62 (Ex. 56); *see also* Torres Decl. ¶ 20 (Ex. 47). Following the issuance of the Memorandum, immigrant community members living in Monterey County, for example, expressed that "[w]e don't matter, why be counted if at the end of the day being counted doesn't matter in terms of political power, which is where we need it most." Soto Decl. ¶ 12 (Ex. 45). And immigrant community members in Virginia explained that "they don't see a benefit in filling out the [census] form if they will not be counted." Sarmiento Decl. ¶ 6 (Ex. 42).

Furthermore, the Memorandum sows fear that the Trump Administration is again seeking to identify the location and numbers of undocumented immigrants, ostensibly for exclusion from apportionment (a grave harm in its own right), but also potentially for immigration enforcement purposes. Alvarez Decl. ¶ 10 (Ex. 1); Bird Decl. ¶ 6 (Ex. 9); Cullinane Decl. ¶ 8 (Ex. 17); Espinosa Decl. ¶¶ 12-13 (Ex. 18); Matos Decl. ¶ 12 (Ex. 30); Mostofi Decl. ¶ 9 (Ex. 34); Oshiro Decl. ¶¶ 10, 14 (Ex. 36); Roche Decl. ¶ 6 (Ex. 38); Sarmiento Decl. ¶ 12 (Ex. 42); Sivongxay Decl. ¶ 13 (Ex. 44). As Dr. Barreto explains, the Memorandum is likely to "generate a chilling

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effect and incentivize households with undocumented immigrants to provide no additional information to the Federal Government that they feel would implicate their immigration status," particularly with respect to census questionnaire items "asking about nativity or ethnic/racial group." Barreto Decl. ¶ 31 (Ex. 56). Since the Memorandum was issued, mixed-status families have questioned "whether they should participate in the Census as a result of their fears that the Government could probe into the undocumented individuals in [their] extended famil[ies]." Espinosa Decl. ¶ 13 (Ex. 18); *see also* Choi Decl. ¶ 19 (Ex. 14); Oshiro Decl. ¶ 10 (Ex. 36); Torres Decl. ¶ 20 (Ex. 47). As with the citizenship question, these fears will predictably reduce census response rates in these communities, particularly with respect to government-related NRFU efforts.

Plaintiffs have already begun to see signs that the Memorandum is deterring census response in their own communities. *See* Baldwin Decl. ¶¶ 8-9 (Ex. 4); Bird Decl. ¶ 12 (Ex. 9); Choi Decl. ¶ 27 (Ex. 14); Espinosa Decl. ¶¶ 10-13 (Ex. 18); Khalaf Decl. ¶¶ 11-12 (Ex. 26); Mostofi Decl. ¶ 9 (Ex. 34); Oshiro Decl. ¶¶ 11-14 (Ex. 36); Sarmiento Decl. ¶ 7 (Ex. 42); Seon Decl. ¶¶ 13-17 (Ex. 43); Sivongxay Decl. ¶ 13 (Ex. 44); Soto Decl. ¶ 12 (Ex. 45); Torres Decl. ¶¶ 2, 16 (Ex. 47); Aranda-Yanoc Decl. ¶ 7 (Ex. 51). Plaintiffs have also observed an appreciable increase in the number of questions from immigrant and Latinx constituents and media (particularly Spanish-language media) about the privacy and confidentiality of their census responses, Barreto Decl. ¶ 16 (Ex. 56); Baldwin Decl. ¶ 8 (Ex. 4); Banerji Decl. ¶5 (Ex.5); Choi Decl. ¶ 19 (Ex. 14); Mostofi Decl. ¶ 9 (Ex. 34); Oshiro Decl. ¶¶ 10, 12, 14 (Ex. 36); Seon Decl. ¶ 16 (Ex. 43); Sivongxay Decl. ¶ 22 (Ex. 44); Torres Decl. ¶ 18 (Ex. 47); Aranda-Yanoc Decl. ¶ 7 (Ex. 51); as well as how the Administration would identify undocumented immigrant populations for exclusion from the apportionment count. Alvarez Decl. ¶ 10 (Ex. 1); Choi Decl.

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¶¶ 18, 27 (Ex. 14); Cullinane Decl. ¶ 8 (Ex. 17); Espinosa Decl. ¶¶ 12-13 (Ex. 18); Oshiro Decl. ¶ 10 (Ex. 36); Seon Decl. ¶ 16 (Ex. 43). These concerns about privacy, confidentiality, and potential immigration consequences reflect further reluctance to respond to the census among an already hard-to-count population at a critical point in the enumeration—right before the start of NRFU operations.[23]

Because of the Memorandum's chilling effect on immigrant communities, the NGO Plaintiffs will have to divert resources from mission critical programs—including education, housing, and pandemic-related assistance—to additional census outreach. *See New York*, 351 F. Supp. 3d at 616-17; Choi Decl. ¶¶ 20-26 (Ex. 14); Espinosa Decl. ¶¶ 14-17 (Ex. 18); Khalaf Decl. ¶¶ 14-15 (Ex. 26); Oshiro Decl. ¶¶ 15-16 (Ex. 36); Seon Decl. ¶¶ 17-18 (Ex. 43); Torres Decl. ¶ 23 (Ex. 47). Plaintiffs' census outreach efforts have centered on publicizing the importance of counting every person, regardless of citizenship or immigration status, including for apportionment purposes. *See* Choi Decl. ¶ 12; Espinosa Decl. ¶ 7 (Ex. 18); Oshiro Decl. ¶ 7 (Ex. 36); Seon Decl. ¶ 9 (Ex, 43); Torres Decl. ¶ 12 (Ex. 47). The Memorandum directly contradicts these messages, which has resulted in members of the communities that the NGO Plaintiffs serve expressing reluctance to respond to the census. Choi Decl. ¶¶ 17, 27 (Ex. 14); Espinosa Decl. ¶¶ 13-14 (Ex. 18); Khalaf Decl. ¶¶ 12-15 (Ex. 26); Oshiro Decl. ¶¶ 10-14 (Ex. 36); Seon Decl. ¶¶ 12-15 (Ex. 43). The NGO Plaintiffs are diverting resources to increase or revise their outreach efforts to overcome the Memorandum's damage because once the enumeration period closes the opportunity for Plaintiffs to ensure their communities are counted—and receive the political power and government funding to which they are entitled—is

[23] U.S. Census Bureau, *2020 Census: Nonresponse Followup*, https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html (June 19, 2020).

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irretrievably lost. *Cf. League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("[W]hen a plaintiff loses an opportunity to register a voter, the opportunity is gone forever").

Defendants' recent decision to accelerate the conclusion of nonresponse followup operations heightens the urgency—and exacerbates these injuries—because it limits the timeframe in which this Court can grant meaningful relief to redress these harms. The Bureau announced earlier this year that it would collect census responses through October 30. Thompson Decl. ¶ 14 (Ex. 57). On August 3, Defendants abruptly reversed course, opting to end field operations even earlier—on September 30, just 54 days from the date of this filing. *See Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count* (Aug. 3, 2020), https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html. This change dramatically reduces the remaining time during which individuals can respond to the census and the time for Plaintiffs to conduct outreach efforts to ensure a complete count. Bird Decl. ¶¶ 10-11 (Ex. 9); Choi Decl. ¶ 24 (Ex. 14); Espinosa Decl. ¶¶ 15, 21 (Ex. 18); Oshiro Decl. ¶ 18 (Ex. 36); Seon Decl. ¶ 22 (Ex. 43); Torres Decl. ¶ 24 (Ex. 47); Thompson Decl. ¶ 16 (Ex. 57). Furthermore, many of the Governmental Plaintiffs' jurisdictions have already observed low response rates in immigrant communities. Alvarez Decl. ¶ 9 (Ex. 1); Baldwin Decl. ¶ 7 (Ex. 4); Brower Decl. ¶ 10 (Ex. 11); Bysiewicz Decl. ¶ 10 (Ex. 12); Hardcastle Decl. ¶ 5 (Ex. 21); Mohamed Decl. ¶ 8 (Ex. 33); Murray Decl. ¶ 7 (Ex. 35); Salvo Decl. ¶ 4 (Ex. 41); Sivongxay Decl. ¶ 10 (Ex. 44). The compounding deterrent effect of the Memorandum on response rates and the short window of time remaining to encourage response requires emergency relief.

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B. By depressing response rates, the Presidential Memorandum will irreparably degrade the quality of census data vital to public policymaking and cause Plaintiffs to lose federal funding.

The Memorandum's harm to response rates will inflict irreparable injury on Plaintiffs by degrading the quality of the resulting Census Bureau data and reducing the funding streams guided by that data. First, the decline in self-response and the decreased NRFU effectiveness resulting from the Memorandum's chilling effect on immigrant communities will degrade the quality of the data that the Governmental Plaintiffs rely upon to "allocate educational and public health resources efficiently and effectively," *New York*, 351 F. Supp. 3d at 610-11, as well as other critical public resources. Salvo Decl. ¶ 8 (Ex. 41); Aragon Decl. ¶ 5 (Ex. 2); Arwady Decl. ¶ 4 (Ex. 3); Baldwin Decl. ¶ 28 (Ex. 4); Bayer Decl. ¶ 6 (Ex. 6); Bell Decl. ¶ 5 (Ex. 7); Bird Decl. ¶ 13 (Ex. 9); Brower Decl. ¶ 13 (Ex. 11); Bysiewicz Decl. ¶ 9 (Ex. 12); Cassidy Decl. ¶ 5 (Ex. 13); Cline Decl. ¶ 5 (Ex. 15); Freedman Decl. ¶ 5; ¶ 5 (Ex. 20); Hardcastle Decl. ¶ 6 (Ex. 21); Jimenez Decl. ¶¶ 3-4 (Ex.24); Kaneff Decl. ¶¶ 5-6 (Ex. 25); Lundine Decl. ¶ 4 (Ex. 29); Medina Decl. ¶ 4 (Ex. 32); McCaw Decl. ¶ 7 (Ex. 31); Rapoza Decl. ¶ 7 (Ex. 37); Rodriguez Decl. ¶ 5 (Ex. 39); Rynerson Decl. ¶ 13; Sternesky Decl. ¶ 9 (Ex. 46); Wheeler Decl. ¶ 9 (Ex. 48); Wyatt Decl. ¶ 13 (Ex. 49); Wortman Decl. ¶ 5 (Ex. 50). Indeed, the decennial census is the "statistical backbone of our country"; census data allows the Government Plaintiffs to "guide[] policy decisions, assists in the direction of city resources generally, and informs responses to public health emergencies and disasters." Salvo Decl. ¶ 13 (Ex. 41). The Governmental Plaintiffs rely upon the census to produce accurate characteristics data to make decisions about housing (Wyatt Decl. ¶¶ 3, 6-7, 11-12 (Ex. 49); Lopez Decl. ¶ 12 (Ex. 20); Sternesky Decl. ¶ 3 (Ex. 46)); school resources (Bird Decl. ¶¶ 14-15 (Ex. 9); Cassidy Decl. ¶ 3 (Ex. 13); Howell Decl. ¶ 2 (Ex. 23); Lane Decl. ¶ 5 (Ex. 27); Lopez Decl. ¶¶ 14-15 (Ex. 28); McCaw Decl. ¶ 6 (Ex. 31); Mohamed Decl. ¶ 6 (Ex. 33); Salvo Decl. ¶ 15 (Ex. 41)); public

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health (Arwady Decl. ¶ 6 (Ex. 3); Hammond Decl. ¶ 3 (Ex. 20); (Ex. 29); McCaw Decl. ¶ 6 (Ex. 31) , Salvo Decl. ¶ 14 (Ex. 41)) and infrastructure and transportation (Aragon Decl. ¶ 5 (Ex. 2); Baldwin Decl. ¶ 16 (Ex. 4); Biagi Decl. ¶¶ 4-5 (Ex. 8); Brower Decl. ¶ 15 (Ex. 11); Lopez Decl. ¶ 13 (Ex. 28); Kaneff Decl. ¶ 3 (Ex. 25); McCaw Decl. ¶ 6 (Ex. 31); Mohamed Decl. ¶ 6 (Ex. 33); Salvo Decl. ¶ 17 (Ex. 41); Wheeler Decl. ¶ 4 (Ex. 48)), among other key decisions. A decline in the quality of that data will impair the Governmental Plaintiffs' "ability to make and implement such policies." *New York*, 351 F. Supp. 3d at 600.

Moreover, as with the citizenship question, reduced response rates among immigrant households due to the Memorandum will result in a net differential undercount of these households, as "each of NRFU's steps will replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households." *New York*, 351 F. Supp. 3d at 583; Barreto Decl. ¶ 70 (Ex. 56) ("[T]he PM increases the likelihood that Latinos, immigrants, and noncitizens are less likely to self-respond to the 2020 census" and that "non-responding individuals are also unlikely to respond after household visits by census enumerators because of fear of government interaction."); Thompson Decl. ¶ 13 (Ex. 57) (explaining that the Memorandum will impact the macro environment and undermine NRFU, "significantly increas[ing] the risk of larger total and differential undercounts"). This undercount will disproportionately deprive Plaintiffs and their constituents of federal funding for education and social services. *New York*, 351 F. Supp. 3d at 597-98; *see also* Aragon Decl. ¶ 6 (Ex. 2); Baldwin Decl. ¶ 15 (Ex. 4); Brower Decl. ¶ 25 (Ex. 11); Kaneff Decl. ¶ 4 (Ex. 22); Lopez Decl. ¶ 11 (Ex. 28).

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C. Plaintiffs will be irreparably harmed by Defendants' efforts to reallocate political power away from their jurisdictions.

The Memorandum's stated goal—to shift political power away from jurisdictions that are home to substantial numbers of undocumented immigrants, 85 Fed. Reg. at 44,680—effectively concedes that Plaintiffs will be irreparably harmed by Defendants' actions. "The Supreme Court has squarely held that the loss of a seat or seats in the House of Representatives" imposes direct harms "because of the dilution of political power that results from such an apportionment loss." *New York*, 351 F. Supp. 3d at 595, 607; *see also Carey v. Klutznick*, 637 F.2d 834, 836-38 (2d Cir. 1980) (finding irreparable harm based on the "deprivation of [the plaintiffs'] right to a fair apportionment" based on the likelihood that New York would lose a congressional seat). The likely loss of political power as a result of the exclusion of undocumented immigrants in the apportionment count constitutes a "concrete," "actual or imminent" injury that is "not 'conjectural' or 'hypothetical.'" *U.S. House of Representatives*, 525 U.S. at 332 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

There is no dispute that an apportionment excluding undocumented immigrants will result in the loss of congressional seats in states in which at least some of the Plaintiffs are located—this is the express purpose of the Memorandum. Dr. Christopher Warshaw confirms that the Memorandum will "almost certainly" cause states with large undocumented immigrant populations to lose congressional seats—its intended impact. Warshaw Decl. § 11 (Ex. 58); *see U.S. House of Representatives*, 525 U.S. at 330 (affirming summary judgment based on expert testimony concerning the loss of congressional seats in apportionment). Dr. Warshaw found that if undocumented immigrants are excluded from the apportionment count, Texas—home to three of the Governmental Plaintiffs' jurisdictions and numerous members of the NGO Plaintiffs—has a 98.3% chance of losing a congressional seat. Warshaw Decl. § 43, Tbl. 7 (Ex. 58). Dr.

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Warshaw further found that New Jersey and California are highly likely to lose seats under the Memorandum, and Florida, Illinois, New York and Arizona are also at risk of losing seats. *Id.*

These harms require immediate relief, as "time is of the essence," and "[d]elayed review would cause hardship to Plaintiffs." *New York*, 351 F. Supp. 3d at 502. The President must report to the Clerk of the House the apportionment population counts for each state within one week of the opening of the next session of Congress, and the Clerk of the House must inform each state governor within fifteen days of receiving the apportionment population counts. 2 U.S.C § 2a(a). Where an invalid apportionment base count threatens to yield a misallocation of congressional seats, "the possibility of irreparable harm . . . is likely, if not certain." *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 88 (D.D.C. 1998). Waiting until Defendants actually alter the apportionment in January 2021 by excluding undocumented immigrants will only create confusion and disruption.

D. The balance of equities and public interest favor a preliminary injunction.

In deciding a motion for a preliminary injunction against the federal government, the inquiries into the "balance of equities" and whether "an injunction is in the public interest" merge. *See Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (citations omitted). In this merged inquiry, the court must "'balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,'" as well as "'the public consequences in employing the extraordinary remedy of injunction.'" *Id.* (quoting *Winter*, 555 U.S. at 24). Here, the balance of the equities and public interest tip sharply in Plaintiffs' favor.

The public interest in a complete and accurate census is paramount. "The integrity of the census is a matter of national importance. As noted, the population count has massive and lasting consequences. And it occurs only once a decade, with no possibility of a do-over if it turns out to

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be flawed." *New York*, 351 F. Supp. 3d at 517. Defendants' actions drive immigrants away from responding to the census and, in so doing, degrade the accuracy and integrity of the resulting headcount. This harm is cumulative and irreparable; each day the Memorandum remains in effect, it will continue to drive down response rates and undermine the "statistical backbone" of the country. Salvo Decl. ¶ 13 (Ex. 41). Likewise, Plaintiffs and the public have an interest in ensuring that the apportionment count and resulting distribution of political power accurately reflects the population at large.

By contrast, Defendants will suffer no injury at all if the Memorandum is enjoined pending a final decision on the merits. As discussed *supra*, the Memorandum's exclusion of undocumented immigrants from the apportionment count violates the Constitution and the Census Act, and "the Government does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quoting *ACLU v. Ashcroft,* 322 F.3d 240, 247 (3d Cir. 2003)). Moreover, the current crisis is one of Defendants' own making, if not their own design. Despite issuing an Executive Order calling for the collection of citizenship data for redistricting purposes more than a year ago,[24] President Trump waited to announce the Memorandum until the middle of the counting period, just as the census was poised to begin critical NRFU operations. Nearly simultaneously, Defendants chose to end the response period a month earlier than scheduled, further limiting the Bureau's ability ensure an accurate headcount. The Memorandum is part of a pattern of conduct by Defendants that is directed at undermining the enumeration, particularly with respect to the counting of immigrants and communities of color. Among other remedial value, a preliminary

[24] *See* Exec. Order No. 13,880, 84 Fed. Reg. 33,821 (July 11, 2019); *see also Remarks by President Trump on Citizenship and the Census* (July 11, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census/.

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injunction will serve the "strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner—and, relatedly, that it is conducted in a manner that bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *New York*, 339 F. Supp. 3d at 150-51 (quotation marks omitted). In particular, a preliminary injunction will help restore some measure of trust in the census that Defendants have repeatedly attempted to erode among immigrants and give Plaintiffs an opportunity to conduct outreach in an atmosphere less polluted by Defendants' misinformation and attempts to intimidate and marginalize immigrants. Barreto Decl. ¶¶ 66-69 (Ex. 56); Espinosa Decl. ¶ 15 (Ex. 18); Choi Decl. ¶ 24-25 (Ex. 14); Seon Decl. ¶ 22 (Ex. 43); Torres Decl. ¶ 24 (Ex. 47).

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment in favor of Plaintiffs, or alternatively a preliminary injunction.

DATED: August 7, 2020

Respectfully submitted,

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Exhibit 56

Expert declaration of Matthew A. Barreto, Ph.D.

I. Background and Qualifications

1. I am currently a Professor of Political Science and Chicana/o Studies at the University of California, Los Angeles. I am the co-founder and faculty director of the Latino Politics and Policy Initiative (LPPI) in the Luskin School of Public Affairs, a national research center that studies policy issues that impact the Latino and immigrant community.

2. Before I joined UCLA in 2015, I was a professor at the University of Washington for more than nine years, where I was promoted to Associate Professor with tenure, and then Full Professor with tenure. At the University of Washington, I was an affiliated faculty member of the Center for Statistics and the Social Sciences, and an adjunct Professor of Law at the UW School of Law. I am also the co-founder of the research firm Latino Decisions.

3. Throughout my career, I have taught courses on Immigration Policy, Racial and Ethnic Politics, Electoral Politics, Public Opinion, Voting Rights, Chicano/Latino History, Introduction to Statistical Analysis, and Advanced Statistical Analysis to Ph.D. students.

4. I earned a Ph.D. in Political Science at the University of California, Irvine in 2005, with an emphasis on racial and ethnic politics in the United States, political behavior, and public opinion.

5. I have published multiple peer-reviewed academic research papers on Latino participation in the U.S. Census, immigrant public opinion and immigrant political engagement (among other topics).

6. In 2018 I provided expert reports and testimony in three federal lawsuits challenging the Department of Commerce's inclusion of a citizenship status question on the 2020 Census, which included an extensive literature review and evaluation of how immigrants react to changes to the U.S. Census. In all three federal trials, the courts recognized my expertise in studying immigrant political and civic participation, and cited my literature review in ruling in favor of the plaintiffs.

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7. I have conducted research nationwide and in New York, California, Indiana, Wisconsin, Pennsylvania, Alabama, Texas, North Dakota, and North Carolina in connection with litigation assessing, among other things, how the public responds to, and is affected by, changes in the law. Courts have accepted my research studies as viable and methodologically accurate instruments to understand how the public responds to changes in state law. In particular, my previous research has focused on understanding sub-group analysis to evaluate differential impacts by race and ethnicity. Recently in North Carolina, a federal court relied on my research in issuing an injunction against the state's voter ID law. In addition, the United States District Court for the District of North Dakota stated in *Brakebill v. Jaeger* (No. 1:16-cv-008) that "the Court gives the findings of the Barreto/Sanchez Survey, and the other studies and data presented by the Plaintiffs, considerable weight." Prior to this, in 2014 in *Veasey v. Perry* (No. 13-CV-00193), the United States District Court for the Southern District of Texas, and in findings affirmed by the Fifth Circuit Court of Appeals, found that my survey was statistically sound and relied upon my survey findings to evaluate the impact of Texas's voter ID law. Likewise, in *Frank v. Walker* (No. 2:11-cv-01128), a survey I administered and included as part of my expert report was given full weight by the United States District Court for the Eastern District of Wisconsin in a voter ID case in Wisconsin.

8. In *Fish v. Kobach* (No. 16-2105-JAR-JPO), the plaintiffs retained me as an expert witness to evaluate the methodology of the defendant's survey, and the United States District Court for Kansas found me to be an expert on best practices of survey research and credible and qualified to discuss survey methodology.

9. I have also regularly presented my expert review and summary of social science literature as part of expert witness reports and declarations, which have been accepted as valid and relied upon by the courts. Review of published social science literature is a well-established method among political scientists and social scientists in general for drawing valid conclusions regarding the general consensus in the field. Literature reviews are an essential component of all academic research and a requirement for publishing peer-reviewed academic research because they

establish the baseline set of knowledge and expectations within the field. As noted above, in litigation challenging the addition of a citizenship question to the 2020 decennial census, three federal courts in New York, California, and Maryland relied upon my literature review as providing credible and valid evidence to help the courts form their opinions.

10. Earlier in 2020, in *New York v. Immigration and Customs Enforcement*, I provided an in-depth literature review examining how immigrant communities respond to increased immigration enforcement, surveillance and monitoring of undocumented immigrants.

11. My full professional qualifications and activities are set forth in my curriculum vitae, a true and correct copy of which I have attached hereto as Appendix A.

II. Scope of Work

12. Plaintiffs in this action retained me to evaluate whether the Presidential Memorandum (PM) issued by President Donald Trump on July 21, 2020 to exclude undocumented immigrants from the apportionment base in 2020 would have a negative impact on the Census participation rates of immigrant communities, including undocumented immigrants, legal permanent residents, and naturalized U.S. citizens. To conduct my evaluation, I reviewed two sources of information. First, I compiled an analysis of news coverage of the PM to assess the reach of the announcement. Second, I conducted a comprehensive literature review on survey methodology, response rates, sensitive questions and methodology, and census procedures addressing missing data and imputation.

13. I worked on this project with Mr. Marcel Roman, a Ph.D. student in the department of Political Science at UCLA and Mr. Chris Galeano, a J.D. student in the UCLA School of Law. Mr. Roman and Mr. Galeano both helped me compile sources for the literature review and news coverage of the aforementioned PM.

III. Executive Summary

14. Based on my review of the news coverage of the PM, the extant literature published in the social sciences, and my own extensive experience with immigrant civic engagement, I conclude that the July 21 PM will reduce participation in the 2020 census, and ultimately will reduce the accuracy of the 2020 census. The PM generates the perception of real and immediate threat for undocumented immigrants that will erode their trust in the census, which will lead to increased non-response in immigrant communities. Calling attention to the citizenship or immigration status of immigrants in a negative light causes immigrants to reduce their civic engagement. The new PM sends a signal of government monitoring citizenship status as it relates to the 2020 Census population count, eroding trust that was restored after the threat of a citizenship question on the Census was removed. The strength of that negative signal is visible in coverage of the PM in Spanish-language media, which is a trusted source of news within Latino and immigrant communities. Signals of a threat to the status of undocumented immigrants generate a well-documented "chilling effect" on public participation for immigrants, i.e., the perception of threat will erode trust that leads to a reduction in immigrant engagement with government programs and officials. However, subsequent official action to counteract such threats--either court orders or changes in agency policy--have positive effects on trust and engagement. The perception of immigration status-related threat generated by the PM will make undocumented and mixed-status households less likely to engage with the Census—particularly with enumerators conducting in-person Non-Response Follow-Up (NRFU). The reduction in response rates among undocumented immigrant and mixed-status households will result the Census Bureau using proxy-response and imputation techniques that are error-prone and tend to undercount immigrant households.

15. My review of news accounts following President Trump's July 21 PM finds there was widespread coverage, particularly within Spanish-language news media. Whether through television, print, or online outlets, the message relayed by the media was that the PM singled out immigrants through a process that invoked citizenship status, or a lack thereof, as part of the 2020

Census, in an effort to exclude them from the apportionment process. Spanish-language news journalists reported that as a result of the PM there was confusion, fear, and anxiety in immigrant communities about fully participating in the 2020 Census. According to a journalist for Telemundo[1] who spoke with many people familiar with the PM, "activists have already reported that this attempt may have scared many people off from responding to the Census, which is particularly detrimental to states with high immigrant populations such as California, Texas, and New York." This sentiment was widely reported across Spanish-language news in the days and weeks following the July 21 PM.

16. Extensive research studies show Spanish-language media acts as a catalyst for engaging, informing and mobilizing Latino and immigrant communities. Spanish-language journalists and news anchors act as a medium for the feelings and concerns prevalent within Latino immigrant communities, specifically those who are undocumented. Spanish-language media plays a central role in mobilizing and educating the immigrant community on immigration issues in particular. The high levels of trust in Spanish-language media amongst immigrants plays a key role when listening and learning about the issues that matter most to them, in particular those related to immigration policy. Research studies have documented that many immigrants take direct cues related to civic engagement and participation from what they hear, read, and watch on Spanish-language media.

17. Undocumented immigrants are deeply intertwined into the fabric of American communities. Research and statistical reports have repeatedly found that undocumented immigrants see themselves as part of American society and indeed have longstanding ties in the cities and towns in which they permanently live. A clear majority of undocumented immigrants have lived in the United States for over five years and have families, hold jobs, own houses, and are part of their community. A survey of Latino undocumented immigrants[2] found that 89% had

[1] Telemundo. "Trump Ordena Al Censo Que No Incluya a Los Indocumentados En El Recuento Que Determina El Reparto De Escaños Del Congreso," July 21, 2020. https://www.telemundo.com/noticias/noticias-telemundo/inmigracion/trump-ordena-al-censo-que-no-incluya-los-indocumentados-en-el-recuento-que-determina-el-tmna3823616.

[2] https://latinodecisions.com/wp-content/uploads/2019/06/NALEO_AV_Undoc_Results.pdf

lived in the U.S. over five years, that 74% have children living with them in the U.S. and 85% have a family member in the U.S. who is a U.S. citizen, and indeed that 87% of undocumented immigrants themselves said they hoped to one day become U.S. citizens if legislation were passed to provide that opportunity.

18. Following the June 2019 ruling by the U.S. Supreme Court blocking the inclusion of a citizenship question, Census partners known as *Trusted Voices* conducted extensive outreach to undocumented immigrants to assure them that the federal government would not be monitoring their citizenship status as it relates to the 2020 Census. The new PM sends a signal of government monitoring citizenship status as it relates to the 2020 Census population count, significantly eroding trust.

19. The published literature is quite clear: a critical component to ensure an accurate response rate on any survey, including the census, is trust between the public and the survey administrator. The prior published studies conclude that response rates will fall without a high degree of trust. The new PM erodes the trust that many community-based organizations with experience serving immigrants had built up over the past year.

20. Trust is particularly important in communities with undocumented populations as many prior reports and publications by the Census Bureau have made clear. The Census Bureau has identified vulnerable population subgroups concerned about the potential misuse of personal information provided to the Census as at-risk for low participation rates and for undercounts. From this perspective, the new PM lowers trust and makes it much harder to stimulate participation in the census from vulnerable populations such as immigrant[3] and minority communities, if such communities do not trust the Census.

21. Far-ranging social science research documents a phenomenon called "the chilling effect" in which immigrant communities withdraw and avoid interactions with government officials or agencies if they believe there could be a risk of adverse consequences for their own

[3] Here we mean persons who are foreign-born and emigrated to the United States.

immigration status or the status of others in the community. Specifically, some studies have found that Census participation rates drop in immigrant communities when federal immigration enforcement is perceived to be connected to the Census. In fact, the Census Bureau has published studies pointing to fears over the federal government learning their about citizenship status as a major obstacle in some immigrant communities.

22. Social science research since the 1990s, but especially so in more recent years, is near consensus in finding evidence of the "chilling effect," i.e., strong patterns of avoidance, withdrawal, and exclusion during times of increased immigration enforcement. This research is often community-focused and highlights how increased attention to immigration status or immigration monitoring by authorities, results in noticeable withdrawal in that specific context. Immigrants, and often their children and others in their close network, will purposely avoid or withdraw from an environment where they fear potential immigration enforcement. The fear associated with detention, separation from their children or family, and possible deportation is so paralyzing that many immigrants – when faced with possible immigration enforcement – avoid even necessary public services such as police protection, health services, going to work, sending their children to school, or attending court to defend their rights. The takeaway is clear – increased negative attention to citizenship status issues decreases trust in those specific agencies or actors and leads to immigrant withdrawal.

23. If trust is low, attempts to re-interview or re-contact households will be far less successful either. Census respondents must believe that there is no jeopardy or threat of disclosure to ensure their participation in a survey, regardless of how many attempts one might make to prompt their participation.

24. Already, a prior study from 2018 about perceptions of the 2020 Census found that levels of trust in immigrant and minority communities in the United States were low as a result of concerns over citizenship. The extensive media attention to the citizenship question resulted in high levels of fears among immigrants. When asked about the protection of their and their family members' sensitive information, including citizenship status, immigrant respondents were

statistically less likely to trust that the Trump administration will protect their information and not share it with other federal agencies (just 35% were trusting). Among Latino respondents overall, just 31% trust the Trump administration to protect their personal information, which is statistically lower than among non-Latinos. While the June 2019 SCOTUS decision may have alleviated these fears by striking the citizenship question, the July 2020 PM effectively re-confirms those immigrant fears because it sends a signal to immigrant communities that the Trump administration will be monitoring their citizenship status so they may subtract these participants from the 2020 base population count for the apportionment base. In essence, Trump has returned the immigrant community to a condition of wariness similar to when the citizenship question was to appear on the census. They believe their participation is either no longer safe, or not required due to the PM of July 2020 to specifically single out undocumented immigrants.

25. The survey also found that large percentages of immigrants and minorities are concerned specifically that their personal information reported on the census will be shared with Immigration and Customs Enforcement (ICE). Overall, 41% of immigrants surveyed state they are concerned about this, along with 40% of Latinos.

26. When households do not initially self-respond to the census, the Census relies on nonresponse follow up (NRFU) to re-contact households to encourage them to respond. In simulated re-contact, my research has demonstrated that a majority of non-responders to the 2020 census will not switch and become participants when asked again to do so. In particular, research has found that NRFU is less successful when immigrant communities have fears about information concerning their citizenship status being collected or revealed.

27. Larger households will be the most difficult to successfully convert from non-participation to participation if there are fears about citizenship status data being collected or monitored, further undermining an accurate count. Existing research has found that among immigrants who would take the census upon NRFU recontact, their average household size is 2.91 compared to an average household size of 3.94 for immigrants who would not participate upon recontact, leaving them, and their larger households uncounted.

28. One of the ways Census Bureau officials try to account for people who refuse to respond to the census is to mathematically account for non-responders through statistical methods such as "substitution" or "imputation." Both of these methods use information on responding households to estimate population information on non-responding households. However, when there are fears about citizenship status are introduced, non-responding households are statistically different than responding households on a variety of critical demographics, which violates an important assumption of substitution or imputation. For these methods to serve as viable alternatives, missing units and reported units should be roughly equivalent. However, the existing research reveals that when fears over citizenship status emerge, non-responding households are more likely to be larger in size, be foreign-born, and have different age and educational outcomes than responding households. This will make substitution and imputation inaccurate and unreliable, and makes it highly likely that there will be a net undercount of households refusing to respond to the census due to the citizenship question.

IV. Literature Review and Research Findings

A. The July 21 Presidential Memorandum Received Wide Coverage in Spanish News Media and Created Confusion and Fear About the 2020 Census

29. On July 21, 2020 President Trump issued a Presidential Memorandum declaring that undocumented immigrants will be excluded from the decennial census for apportionment purposes.[4] Specifically, following the completion of the 2020 Census, the PM requires that individuals without lawful immigration status be excluded from the apportionment base for the purpose of the reapportionment of the U.S. House of Representatives. The PM refers to last year's Executive Order 13880,[5] which instructed executive departments and agencies to share

[4] Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (July 21, 2020), https://www.whitehouse.gov/presidential-actions/memorandum-excluding-illegal-aliens-apportionment-base-following-2020-census/

[5] Collecting Information About Citizenship Status in Connection With the Decennial Census (July 11, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-collecting-information-citizenship-status-connection-decennial-census/

information with the Department of Commerce . . . to obtain accurate data on the number of citizens, non-citizens, and illegal aliens in the country." This order signals to hard-to-count populations, such as undocumented immigrants and mixed status families, that the federal administration is compiling citizenship related data on them, and that they are to be excluded from the 2020 Census.[6] While there are technicalities that an undocumented immigrant may fill out the Census form, and then be deducted later, this nuance is lost on a community that has been under constant attack and threat from President Trump and his administration. A memorandum issued by the President stating that undocumented immigrants will be identified in specific communities and then excluded from the official Census population count sends a clear message of exclusion.

30. In particular, the PM reverses recent progress that has been made by community-based organizations following the June 2019 Supreme Court ruling which blocked the citizenship question from being added to the 2020 Census. In an effort to mitigate the challenge posed by the citizenship question, outreach advocates also sought to use the U.S. Supreme Court's decision as a starting point "to convince everyone to participate in the census count" and emphasize the benefits of participating in the census.[7] Because the highest and definitive court in our country had struck down the citizenship question, outreach to immigrant communities could emphasize this as a selling point to fill out the census without any fears about someone's immigration status being reported. For the Census Bureau's part, they would enact a public outreach plan that involved "working with local organizations to encourage census participation among immigrants, communities of color and other groups the bureau considers hard to count" to combat the mistrust by these communities.[8]

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[6] Some point out that matching census and administrative data will lead to matching errors and exclude millions of U.S. citizens from the apportionment process. Randy Capps et al., Millions of U.S. Citizens Could Be Excluded under Trump Plan to Remove Unauthorized Immigrants from Census Data, Migration Policy Institute (July 2020), https://www.migrationpolicy.org/news/millions-us-citizens-could-be-excluded-under-plan-remove-unauthorized-immigrants-census

[7] https://www.huffpost.com/entry/2020-census-citizenship-question_n_5d2f378ce4b02fd71dddf974

[8] https://www.npr.org/2019/07/31/746508182/push-for-a-full-2020-count-ramps-up-after-census-citizenship-question-fight

31. The new PM undermines these efforts and implies the government is attempting to enumerate the undocumented immigrant population, which could undercut participation. Because of the 2019 Supreme Court decision, there is no direct mechanism for assessing whether a Census response includes data from an undocumented immigrant using Census responses. If the federal government is attempting to exclude undocumented immigrants from the Census count, immigrant communities are likely to draw two conclusions. First, undocumented immigrants, the people they live in the same household with, and others in immigrant communities may be worried the government is attempting to find out their legal status through other means. This is not beyond the realm of possibility, given that the Trump administration has instructed federal agencies to use existing state and federal records to determine citizenship status (Levine, 2020)[9]. This could generate a chilling effect and incentivize households with undocumented immigrants to provide no additional information to the Federal Government that they feel would implicate their immigration status. Second, undocumented immigrants and those with ties with undocumented immigrants may think the government will use other means to find them, such as their responses to questions asking about nativity or ethnic/racial group. Therefore, they will not fill out the Census form writ large since probabilistically, providing information on other characteristics might facilitate government efforts to track and identify undocumented immigrants.

32. After the President announced the PM, widespread reports about how the PM would seek to exclude undocumented immigrant populations from the reapportionment process were published by major news outlets throughout the U.S.[10] Major Spanish-language media and

[9] For instance, Nebraska, South Dakota, and South Carolina voluntarily agreed to transfer citizenship data from their state driver's license and state ID records to the U.S. Census Bureau (Wang, 2020)

[10] Alex Daughery, *Florida Could Lose Power in Washington if Trump's New Immigration Order is Enacted*, MIAMI HERALD (July 21, 2020), https://www.miamiherald.com/news/politics-government/article244382462.html; Alexandra Alper and Nick Brown, *Trump Issues Memo To Stop Counting Undocumented Migrants In Next Round Of Redistricting*, HUFFINGTON POST (July 21, 2020), https://www.huffpost.com/entry/trump-executive-order-immigrants-redistricting_n_5f1709e0c5b615860bb7f415; Chris Megerian, *Trump Tries New Move to Restrict Census, Could Cut California's Seats in Congress*, L.A. TIMES (July 21, 2020), https://www.latimes.com/politics/story/2020-07-21/trump-new-tack-restrict-immigrants-census; David Jackson, *Trump Tells Census to Not Count Undocumented People for Purposes of Deciding House Apportionment*, USA

print news outlets throughout the nation also reported on the PM. They included Telemundo,[11] Univision,[12] Azteca America,[13] and Estrella TV[14]—all major media sources for Spanish-speaking viewers with hundreds of local television stations and affiliates throughout the U.S.[15] Newspapers and online media outlets for Spanish-speaking readers also reported on the PM's intention to leave out undocumented immigrants from the reapportionment process.[16] Whether

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TODAY (July 21, 2020), https://www.usatoday.com/story/news/politics/2020/07/21/trump-tell-census-not-count-undocumented-immigrants/5459873002/; Jill Colvin and Kevin Freking, *Trump to Exclude Those in US Illegally From Congressional Reapportionment Count*, CHICAGO SUN-TIMES (July 21, 2020), https://chicago.suntimes.com/2020/7/21/21333076/trump-to-llegally-from-congressional-reapportionment-count; Katie Rogers and Peter Baker, *Trump Seeks to Stop Counting Unauthorized Immigrants in Drawing House Districts*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/us/politics/trump-immigrants-census-redistricting.html; Kevin Freking and Mike Schneider, *Trump's New Immigration Fight: How to Redraw House Districts*, HOUSTON CHRONICLE (July 21, 2020), https://www.chron.com/news/article/Trump-seeks-to-bar-illegal-aliens-from-15423258.php; Kevin Liptak et al., *Trump Signs Order Targeting Undocumented Immigrants in the US Census*, CNN (July 21, 2020), https://www.cnn.com/2020/07/21/politics/white-house-census-undocumented-immigrants/index.html; Tara Bahrampour, *Trump Administration Seeks to Bar Undocumented Immigrants From a Portion of the 2020 Census*, SEATTLE TIMES (July 21, 2020), https://www.seattletimes.com/nation-world/trump-administration-seeks-to-bar-undocumented-immigrants-from-a-portion-of-the-2020-census/

[11] *Trump Ordena Al Censo Que No Incluya a Los Indocumentados En El Recuento Que Determina El Reparto De Escaños Del Congreso*, TELEMUNDO (July 21, 2020), https://www.telemundo.com/noticias/noticias-telemundo/inmigracion/trump-ordena-al-censo-que-no-incluya-los-indocumentados-en-el-recuento-que-determina-el-tnna3823616; *Trump Firma Decreto Para Excluir a Indocumentados del Censo 2020*, TELEMUNDO SAN ANTONIO (July 21, 2020), https://www.telemundosanantonio.com/noticias/la-casa-blanca/presidente-trump-decreto-indocumentados-censo-2020/2068275/.

[12] *Trump Ordena al Censo No Contar a Los Indocumentados en un Memo de Dudosa Legalidad y Difícil de Cumplir*, UNIVISION (July 21, 2020), https://www.univision.com/noticias/elecciones-en-eeuu-2020/trump-ordena-al-censo-no-contar-a-los-indocumentados-en-un-memo-de-dudosa-legalidad-y-dificil-de-cumplir.

[13] Ju Carpy, *Trump Firma Memo Para Excluir a Migrantes del Censo*, AZTECA AMERICA (July 21, 2020), https://aztecaamerica.com/2020/07/21/trump-firma-memo-para-excluir-a-migrantes-del-censo/

[14] Maria Teresa Sarabia, *Inmigrantes Indocumentados No Serán Contados*, ESTRELLA TV (July 21, 2020), http://noticiero.estrellatv.com/noticias/inmigrantes-indocumentados-no-seran-contados-noticiero-estrella-tv/

[15] *Owned Stations*, TELEMUNDO, https://www.nbcumv.com/owned-stations/telemundo-station-group/about?network=5266626 (last visited July 31, 2020); *Local Media*, UNIVISION COMMUNICATIONS INC., https://corporate.univision.com/partner-with-us/local/ (last visited July 31, 2020); *TV*, ESTRELLA TV, http://www.estrellamedia.com/programming/tv (last visited July 31, 2020); *Azteca America*, GRUPO SALINAS, https://www.gruposalinas.com/en/aztecaUS (last visited July 31, 2020).

[16] Jesús García, Trump Firma Memorando Para Excluir a Inmigrantes Indocumentados del Censo, La Opinion (July 21, 2020), https://laopinion.com/2020/07/21/trump-firma-memorando-para-excluir-a-inmigrantes-indocumentados-del-censo/; Jesús García, Trump Firma Memorando Para Excluir a Inmigrantes Indocumentados del Censo, El Diario (July 21, 2020), https://eldiariony.com/2020/07/21/trump-firma-memorando-para-excluir-a-inmigrantes-indocumentados-del-censo/; Kevin Freking and Mike Schneider, Trump Firma Memo Que Afectaría Conteo de Migrantes, El Nuevo Herald (July 21, 2020), https://www.elnuevoherald.com/noticias/estados-unidos/article244382772.html ; https://www.msn.com/es-mx/noticias/mundo/ordena-trump-excluir-a-indocumentados-del-censo-en-eu/ar-BB171eMI ; https://cnnespanol.cnn.com/video/censo-elecciones-indocumentados-migrantes-trump-memorando-constitucion-estados-unidos-dusa-vo/ ; https://cnnespanol.cnn.com/2020/07/21/trump-firma-orden-para-excluir-inmigrantes-indocumentados-en-el-censo-2020/ ; https://es-us.noticias.yahoo.com/trump-firma-memorándum-excluir-indocumentados-193912301.html ; https://www.dallasnews.com/espanol/al-dia/estados-unidos/2020/07/21/donald-trump-pedira-al-censo-2020-que-no-

through television, print, or online mediums, the message relayed by the media was that the order singled out immigrants through a process that invoked citizenship status, or a lack thereof, as part of the 2020 Census, in an effort to exclude them from the apportionment process. Since the PM was signed, it has prompted discussion by Spanish-language news segments on its implications for the immigrant community.[17] These reports have conveyed to Spanish-speaking audiences that millions of undocumented immigrants living in the U.S. would not be counted when deciding how to apportion congressional seats because of the PM, affecting states such as California, Florida, and Texas, each of which includes large undocumented immigrant populations within their communities.[18]

33. Across these news accounts, immigrants, as well as individuals who worked with community-based organizations that serve immigrants, and even journalists, all stated that they believed the July 21 PM was an effort to sow confusion and distrust, and to reduce the count of Latinos and immigrants on the 2020 Census. Examples of some of the direct quotations from these news sources include:

a. *"Este memo obviamente causa miedo entre esta población en particular, te pregunto, ¿podría ser el miedo una de las razones por la que la comunidad hispana no participe en el Censo 2020 o se siente que su participación sea baja? Lamentablemente no es la primera ves que el Presidente Trump amenaza y amedrenta nuestra comunidad inmigrante indocumentada... y si, fomenta el miedo en nuestras comunidades. Una ves más, le dice a nuestra comunidad inmigrante, no se cuenten, no los necesitamos."* "This memo obviously causes fear among this particular population, I ask you, could fear be one of the reasons

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cuente-a-los-indocumentados-segun-funcionario-de-la-casa-blanca/ ; https://laoferta.com/2020/07/21/trump-ordena-excluir-a-indocumentados-de-distribucion-electoral-tras-censo/ ; https://www.lavanguardiahoy.com/trump-firma-memorandum-que-busca-excluir-a-indocumentados-del-censo-2020/ ; https://www.excelsiorcalifornia.com/2020/07/22/trump-abre-nueva-polemica-al-ordenar-enxcluir-a-indocumentados-de-censo/

[17] https://www.telemundo62.com/videos/videos-noticias/implicaciones-de-remover-a-los-indocumentados-del-censo-2020/2063236/ ; https://www.univision.com/local/los-angeles-kmex/que-implicaciones-tiene-la-orden-de-trump-que-busca-excluir-a-los-indocumentados-del-censo-2020-video ; https://www.univision.com/local/philadelphia-wuvp/lideres-reaccionan-ante-peticion-de-trump-para-excluir-a-personas-indocumentadas-del-censo-2020-video

[18] https://www.chron.com/news/article/Orden-de-Trump-afecta-censo-en-California-15434405.php ; https://eldiariony.com/2020/07/21/enorme-oposicion-a-orden-de-trump-que-afectaria-a-millones-de-inmigrantes-y-que-califican-de-ilegal/ ; Mike Schneider, Orden de Trump afecta censo en California, Florida y Texas, El Nuevo Herald (July 25, 2020), https://www.elnuevoherald.com/article244496782.html

why the Hispanic community does not participate in the 2020 Census or feels that their participation is low? Unfortunately, this is not the first time that President Trump has threatened and intimidated our undocumented immigrant community... and yes, he has fostered fear in our communities. Once again, he tells our immigrant community, don't count yourselves, we don't need you."[19]

b. *"Hay varias organizaciones que están reaccionando y no están de acuerdo con esta movida de la casa blanca porque ya llevan más de un año tratando de incentivar a la comunidad de indocumentados para que participen del censo, para que no tenga miedo y hagan escuchar su voz, ahora esta acción prácticamente se convierte en un golpe bajo para la comunidad de inmigrantes indocumentados en este país."* "There are several organizations that are reacting and do not agree with this move by the White House because they have been trying for more than a year to encourage the undocumented community to participate in the census, so that they are not afraid and make their voice heard, now this action practically becomes a low blow to the undocumented immigrant community in this country." [20]

c. *"Además, afirman que el anuncio del presidente "claramente" tiene la intención de promover el miedo y disuadir la participación en el censo de inmigrantes y sus familias, ya que se produce solo unas semanas antes de que los enumeradores estén programados para salir y alentar a los hogares a responder al censo."* "In addition, it claims that the president's announcement is "clearly" intended to promote fear and discourage participation in the census by immigrants and their families, since it comes just weeks before enumerators are scheduled to leave and encourage households to respond to the census."[21]

d. *"Algunos oponentes afirman que es un intento para suprimir el creciente poder político de los latinos en Estados Unidos y discriminar a las comunidades inmigrantes de otras minorías no blancas."* "Some opponents claim it is an attempt to suppress the growing political power of Latinos in the United States and to discriminate against other non-white, minority immigrant communities"[22]

e. *"Es una manera de tratar de eliminarnos numéricamente del mapa, borrarnos en cuanto a números"* "It is a way of trying to wipe us out numerically, wipe us out in terms of numbers"

34. The PM has threatened to upend a year's worth of outreach efforts by groups focused on hard-to-count populations. These groups now face a big challenge: reach out to

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[19] Telemundo 62. "Implicaciones De Remover a Los Indocumentados Del Censo 2020." Telemundo 62. Telemundo 62, July 22, 2020. https://www.telemundo62.com/videos/videos-noticias/implicaciones-de-remover-a-los-indocumentados-del-censo-2020/2063236/.

[20] Univision. "Líderes Reaccionan Ante Petición De Trump Para Excluir a Personas Indocumentadas Del Censo 2020." Univision, July 22, 2020. https://www.univision.com/local/philadelphia-wuvp/lideres-reaccionan-ante-peticion-de-trump-para-excluir-a-personas-indocumentadas-del-censo-2020-video.

[21] EFE, Agencia. "Coalición De Fiscales Demanda Al Presidente Trump Por Su Acción Con El Censo." Yahoo! Yahoo! Accessed July 29, 2020. https://es-us.noticias.yahoo.com/coalici%C3%B3n-fiscales-demanda-presidente-trump-230425578.html.

[22] Mike Schneider. "Orden De Trump Afecta Censo En California, Florida y Texas." Houston Chronicle. Associated Press, July 29, 2020. https://www.chron.com/news/article/Orden-de-Trump-afecta-censo-en-California-15434405.php.

people who haven't filled out their census form yet who are now worried the federal administration will use whatever information they provide in the 2020 Census to target them. Solving this challenge is now more urgent for these groups given the Census Bureau's recent decision to shorten the period for collecting responses, including NRFU operations, by 31 days.[23]

35. According to Arturo Vargas, the CEO of NALEO, one of the nation's top civic engagement organizations in the Latino and immigrant community, the new PM is a setback that creates fear in the immigrant community. NALEO has been identified by the Census Bureau itself as one of the most important "trusted voices" to earn trust in the Latino community. Vargas stated on Twitter[24]: "With a successful #NALEOVirtual Conference done, time now to refocus on #Census2020 - which just got even MORE DIFFICULT with @POTUS effort to exclude immigrants from the apportionment numbers and cutting short @uscensusbureau's time to finish the count. Our community is scared." Vargas went further to note[25] that the new PM was undoing progress made after striking the citizenship question, "#Census2020 is the most challenging to promote participation I have seen in my career. After @SCOTUS stopped a citizenship question, we had a fighting chance. Now @POTUS has made it much harder by his July 21 memo and by cutting off @uscensusbureau's field work early. @NALEO"

B. Spanish-Language News Media is a Trusted Source for Immigrants

36. Studies show Spanish-language media acts as a catalyst for engaging and mobilizing Latino and immigrant communities. Spanish-language journalists and news anchors act as a medium for the feelings and concerns felt amongst Latino immigrant communities, in particular among undocumented immigrants. Green-Barber discuss these trends in Spanish-speaking media.[26] She found that Spanish-speaking households have high utilization of internet

[23] https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals
[24] https://twitter.com/ArturoNALEO/status/1291764313405812737?s=20
[25] https://twitter.com/ArturoNALEO/status/1291792560390729728?s=20
[26] Lindsay Green-Barber, Latinos and the media: Patterns, changes and ideas for more connection, Center for Investigative Reporting.

and Spanish TV and radio, indicating the large presence and critical role of the Spanish-language media has in Spanish speaking homes. She also found that the Spanish-speaking media plays a central role in mobilizing and educating Latino communities on immigration issues in particular.

37. Research shows that households who more closely follow Spanish-language news rely on that information when it comes to civic and political engagement.[27] Garcia-Rios and Barreto (2016) investigated media habits of Latino immigrants and found that people with high rates of Spanish-language news consumption were more informed and had high rates of immigrant identity, meaning that they were particularly aware and responsive to immigration-related news and current affairs.[28] In 2012, a positive association between Spanish news coverage of President Obama's DACA program and immigrant identity spurred naturalized citizens to vote at higher rates. In other instances, exposure to negative information can lead to withdrawal.

38. Research on Spanish-language media by Federico Subervi-Velez (2008) notes "the intersection between media and Latinos when assessing political socialization and mobilization of Latinos."[29] To put simply, Spanish-language media is a critical bridge that informs and influences immigrants in politics and is often a direct reflection of Latino immigrant opinion in America. One example is the reliance of Spanish-language radio to share and spread information about anti-immigrant legislation in the U.S. Congress (Felix et. al, 2008). Research found that Spanish media personalities such as Almendarez Coello (El Cucuy), Eduardo Sotelo (El Piolin) and Christina Saralei presented and educated the community on the anti-immigration rhetoric that was becoming prominent in politics (Felix et al, 2008). Coello and Sotelo's provided daily updates and created awareness about H.R. 4437, a bill that could negatively impact immigrant communities. In particular, research has found that the high levels of trust in

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[27] Barreto, Matt. Garcia-Rios, Sergio. "Politicized Immigrant Identity, Spanish-Language Media, and Political Mobilization in 2012." RSF: The Russell Sage Foundation Journal of the Social Sciences. January 06, 2016

[28] Barreto, Matt. Garcia-Rios, Sergio. "Politicized Immigrant Identity, Spanish-Language Media, and Political Mobilization in 2012." RSF: The Russell Sage Foundation Journal of the Social Sciences. January 06, 2016, p. 78.

[29] Subervi-Vélez, Federico A., ed. 2008. The Mass Me- dia and Latino Politics: Studies of U.S. Media Content, Campaign Strategies and Survey Re- search: 1984–2004. New York: Routledge.

Spanish-language media plays a key role when Latino immigrants read or hear about the issues that matter most to them, like immigration policy.

C. Trust and Socio-Political Context are Two Key Factors That Impact Survey Response Rates and Accuracy

39. The decennial census is a population survey. There have been extensive studies across the social sciences documenting the best practices and potential pitfalls in collecting accurate survey data. With respect to evaluating the 2020 Census there are two key takeaways that are quite clear in the published literature. First, trust between the public and the survey administrator is crucial. Prior studies conclude that response rates will fall without a high degree of trust, leading to a biased survey project because it excludes people from the data and is no longer representative. Second, the social and political context during survey implementation can greatly impact trust, confidence, and participation rates. This is especially the case for vulnerable populations when they perceive an unwelcoming environment or context. Of these key takeaways, the hallmark of cooperation in any survey is trust. Subjects are more likely to participate in a survey, to complete survey items accurately, and respond fully to survey items when they trust the survey administrator. When potential respondents are suspicious, uncertain, anxious or untrusting, non-response rates significantly increase. An early study on this topic framed the issue as how much threat potential respondents perceive through the source of the survey (Ball 1967; Bradburn et al. 1978). When subjects identify the survey as being implemented on behalf of authorities who they perceive could use their answers against them, they are likely to not-respond, or to respond untruthfully (Ball 1967). From this perspective, newfound fears about citizenship status due to the July 21 PM will make securing participation of immigrant communities much harder than if the PM had never been issued.

40. A research study by the U.S. Government Accountability Office in 2003 (GAO-03-605) laid out the most appropriate approaches to surveying the Latino population specifically. The report was commissioned because prior government surveys, in particular the Census, were

characterized by high rates of non-response with Latino respondents. The report stated that distrust – especially of those representing the government – was a leading factor in Latino immigrant non-response. To fix this, the report recommended increasing trust so that potential survey respondents are not fearful of their participation, and not suspicious of the census questions being asked, or the census enumerators visiting their community. The July 21 PM related to undocumented immigrants does precisely the opposite, increasing *distrust* and, therefore, making it substantially less likely that members of the Latino immigrant subgroups will respond to the census.

41. De la Puente (1995) examined issues related to trust, confidentiality. and fear among potential census respondents in El Paso, Texas and found that fear and apprehension on part of the sample area residents led to concealment of information from the Census Bureau and from the ethnographers, due to their belief that the government will not keep their information private or confidential when it comes to highly sensitive questions. This research establishes that the Census Bureau already knows it has challenges with trust in some immigrant communities and attempts to overcome those challenges by not asking sensitive questions that make it very difficult to persuade communities with low trust. While the threat of a citizenship question was dropped, this brand new PM of July 21 instills a new sense of confusion and fear and will result in increased problems with trust in such communities and a corresponding reduction in Census response.

42. In a follow-up study a decade later, de la Puente (2004) concluded that individuals with unstable immigration statuses were much less likely to trust the government and specifically less likely to fill out the census questionnaire. Indeed, properly counting undocumented immigrants has long been a concern for the Census Bureau. De la Puente's research demonstrated that respondents with irregular immigration statuses are unlikely to directly cooperate with the Census if they perceive their immigration status will be revealed. The July 21 PM does precisely this,; it sends a strong signal to undocumented immigrants that the federal government is collecting data about them, and will match various government records to find and exclude certain immigrants. One respondent in the de la Puente study, who did have legal status as a student, was afraid to participate in the Census because she feared that at some point in the future she may go out of

status and that the information she provided to the Census Bureau might be used to track her down. According to de la Puente, it is critical that immigrant respondents clearly understand that their immigration status is not associated with the Census population count.

43. An important practice that ensures higher participation rates in surveys is respondent anonymity, particularly when there might be concerns over immigration status. The Census violates anonymity by requiring the respondent to list the names of all household members. If respondents do not trust the survey administrator, and there is no anonymity, vulnerable respondents are far less likely to participate. Tourangeau and Yan (2007) explain how the "threat of disclosure" can result in non-response. Generally, people have concerns about the possible consequences of participating in a survey, or giving a truthful answer should information become known to a third party with enforcement powers. The authors explain a survey may be "sensitive" if it raises fears about the likelihood or consequences of disclosure of the answers to agencies or individuals directly, or not directly involved in the survey. As an example, Tourangeau and Yan (2007) discuss asking a question about marijuana use to a group of teenagers. If the teens suspect that the answers could be shared with their parents, they opt out of the survey or lie. But if the survey is completely anonymous and implemented by their peers, they are much more likely to participate and be truthful. The *perceived* threat of disclosure to authorities is what matters. With the July 21 PM, the federal government has clearly created a perception of threat for immigrants and the 2020 Census.

44. A review of findings across different surveys suggest that the likelihood of survey response largely depends on timing and contextual factors, including the respondent's personal situation and the features of the data collection, such as the degree of privacy it offers. The exact same survey might be highly sensitive and risk non-participation in one setting, but be acceptable and proper in another. To this point, a comprehensive review of survey environment research indicates that highly sensitive surveys will be disruptive, produce non-response, or result in biased data when the respondent is concerned that their answers could be known by authorities. However, if the respondent feels secure and has total privacy and anonymity, they are likely to participate

and provide truthful answers (Tourangeau and Smith 1996). In particular, Krysan (1998) found evidence that respondents greatly modified their answers to questions and issues related to views about race, ethnicity, and immigration based on how they felt the interviewer would perceive or judge their responses.

45. Concerns about confidentiality are likely to exacerbate the unwillingness of certain communities to respond to the Census in the current socio-political context created by the July 21 PM. A study of immigrant communities' knowledge and awareness of the Census found that one major concern was confidentiality of personal information (Raines 2001). Beyond the Latino immigrant community, this study reported evidence that immigrants from Laos, Somalia, Iraq, Bosnia, and Haiti expressed concerns over anonymity and confidentiality. The general takeaway is that as additional private, personal, or sensitive questions are added, the degree of concern over anonymity and confidentiality raises considerably. Even if the Census Bureau provides assurances, many may not believe or trust those assurances. In part, this might be due to the current social and political context (laid out above in paragraphs 29-34) or could also be due to prior experiences in their home country with authoritarian regimes and government data collection. Thus, for a population survey to be accurate, it is critical that respondents truly believe their answers to questions will always remain confidential and not used against them. The July 21 PM opens the door to that exact fear because the federal government plans to use administrative data and records to exclude undocumented immigrants from the base population count.

D. The Threat of Non-Response is Real and Immediate

46. The overall national sociopolitical environment has raised awareness and alertness among immigrant communities, but by itself, the national context does not depress immigrant participation. Instead the published literature is clear that immigrants react to specific threats as they develop, and they engage fully when those threats are removed. Indeed, in areas with low levels of immigration enforcement and threat of deportation, or in so-called sanctuary cities, research does not find evidence of a chilling effect or withdrawal (e.g. Garcia 2019). However,

the national context does cause immigrants to take more notice of their surroundings and be aware of the potential for a negative interaction with immigration officials. When immigration enforcement is heightened, the current (2017-2020) national sociopolitical climate can result in a more significant withdrawal. Put simply, President Trump has put the immigrant community on edge. In June of 2019, they had the protection of the U.S. Supreme Court which gave assurances that their citizenship status could not be connected to the 2020 Census. The July 21 PM changed the risk of threat in the minds of many immigrants who hear Trump's words as connecting a federal monitoring program of undocumented immigrants to the 2020 Census. They may not do the full research to realize they can still fill out the Census safely, because they hear the news which is connecting the July 21 PM to Trump's longstanding desire to increase deportation of undocumented immigrants. Further, the July 21 PM sends the signal to undocumented immigrants to avoid the Census because they will not be counted. If the President issues a memorandum saying you will not be counted on the Census base population count, and you have a lingering fear over your citizenship status, there is virtually no reason at all to transmit your entire household's personal information to the federal government. Existing research makes clear that when new threats emerge due to changes in policy, immigrants take note and withdraw.

47. Perhaps the best summary of how the combination of federal policies and political environments interact is found in a new book by Angela Garcia, *Legal Passing: Navigating Undocumented Life and Local Immigration Law* (2019). In this book, Garcia reviews a plethora of data and research on how immigrant communities respond and react to both threatening and accommodating environments, and how a national climate of hostility does not automatically create a chilling effect for immigrants everywhere. Rather, Garcia showed with extensive evidence that specific context and the proximate threat of immigration enforcement versus accommodation is what matters the most. Instances with the highest levels of threat produce the most withdrawal. In her study of more accommodating or welcoming environments, Garcia finds immigrants are able to navigate life effectively, writing "At the same time, this book also argues against the popular depictions of undocumented immigrants being pushed underground, their perception of

threat so strong that they avoid engaging in public life… As compared to restrictive destinations, the integrative outcomes of accommodating locales that I describe in this book are evident in undocumented Mexicans' ease of physical navigation, deeper willingness to interact with local police, and place-based sense of belonging." Of particular importance is the timing of when threats pop up or become visible. Garcia describes "initial reactions immediately after new clampdowns – sweeps, raids, and checkpoints" being the most intense periods of avoidance. However eventually immigrants learn how to navigate their communities, and to avoid locations of particular threat, but otherwise effectively go about their day.

48. Thus, the literature demonstrates that the current era is a particularly anxiety-inducing period in American history for undocumented immigrants, and those concerned about immigration enforcement. However, this just serves to frame the environment, it does not by itself lead to wholesale withdrawal. Rather, the literature points to the importance of specific instances of threat that result from new policies that create fear, anxiety and avoidance.

49. Prior survey research in January 2020[30] assessed how Latinos in New York reacted to information about whether or not ICE was present in and around state courthouses. The question there was whether increased threat of immigration enforcement resulted in immigrant withdrawal. ICE was sporadically conducting immigration-related searches in or near state courthouses across New York. In our survey experiment, we randomly assigned one set of respondents to a condition in which we reminded them of ICE presence at state courthouses, while other respondents were randomly assigned to a condition without the information about ICE presence.

50. Across the full sample of Latinos in New York, the survey experiment results demonstrate that being informed about ICE presence at state courthouses has a strong, and statistically significant causal effect on increasing avoidance behavior and withdrawal. This effect is consistent across eight different types of engagement. When confronted with information about

[30] Survey conducted as part of the expert declaration by Matthew A. Barreto in NY v. ICE lawsuit.

ICE conducting arrests and detention at courts in New York, Latino participants reduced their intention to attend state court as a witness, as a defendant, to accompany a family member, to protect their rights, or to testify about a housing complaint. In addition, they were less likely to go to the police as witness, or to call the local police if they witness a crime, or to submit a police report as a victim. This suggests that when Latinos and immigrants learn about a new threat, they respond immediately with reduced intention to participate or engage.

51. Because the overall sample size of the survey was large (n=1,001) the New York courthouse research included additional analyses on immigrant segments within the main sample. The results of the subset analysis are consistent with the extant literature and expectations, with much stronger causal effects of avoidance and withdrawal among the foreign-born Latinos, and much stronger effects among non-citizens, and the strongest causal evidence of the chilling effect among Latinos are acquainted with an undocumented immigrant. These analyses provide very strong evidence that is theoretically motivated and consistent with decades of social science research on the immediate chilling effect of immigration enforcement.

52. A newer study conducted during the period of Trump's presidency finds similar results. The Violence Against Women Act (VAWA) allows women who are victims of domestic violence to petition to change their immigration status and was used effectively when women felt safe enough to call immigration officials. However, in February 2017 the Trump administration reactivated the Secure Communities program which coordinated local police databases with ICE. As such, in areas of increased ICE presence, the study found that fewer and fewer women initiate police reports of domestic violence. The authors explain this is due to fears over being reported to, or detained by ICE. As the authors conclude, "intensified immigration enforcement might increase misreporting due to fear of being over scrutinized and, potentially, placed in a position that jeopardizes the possibility of staying in the country." (Amuedo-Dorantes and Arenas-Arroyo 2019). This is yet another example of a before/after study which finds direct and immediate evidence of immigrant withdrawal after a change in policy, in this case, by the Trump administration.

E. Extensive Research Confirms Fears About Immigration Enforcement and The Chilling Effect

53. Additional ethnographic research has revealed that undocumented immigrants and mixed-status households are likely to avoid government contact when they suspect it is not safe to participate (de la Puente 1995). This is especially the case when sensitive topics will be potentially discussed or revealed. Velasco (1992) maintains that undocumented immigrants in his sample area in San Diego, CA avoided contact with government. He argues that this avoidance was one of the important contributing factors to census omission and estimates that over half of the sample area residents were undocumented immigrants. Similar situations were also reported in the Miami, FL sample area (Stepick 1992) and in the 26 rural Marion County, OR sample areas (Montoya 1992). However, the ethnographic research all concludes that participation barriers can be overcome by not including worrisome questions about citizenship status and by working with community based organizations and cultural facilitators to increase trust and confidence in data privacy.

54. Levels of trust in immigrant and minority communities are very low with respect to issues related to citizenship. In a prior national survey about the 2020 Census, when asked about protecting sensitive information, including citizenship of themselves and family members, only 35% of immigrants expressed trust that the Trump administration will protect their information and not share it with other federal agencies. Among Latino respondents overall, just 31% trust the Trump administration to protect their personal information. According to my prior survey research, a very large percent of immigrants and minorities believe the Trump administration will share their personal information with other federal agencies.

55. Research related to the 2020 Census suggests that the Census Bureau was well aware of potential issues related to non-response over immigration fears. A comprehensive study by the Census Bureau's Center for Survey Measurement presented at the National Advisory Committee on Racial, Ethnic, and Other Populations Fall Meeting 2017 (Meyers 2017) reported an increase in respondents expressing concerns to researchers and field staff about confidentiality and data

access related to immigration, legal residency, and citizenship status, and their perception that certain immigrant groups are unwelcome. There was an observation of increased rates of unusual respondent behaviors during pre-testing and production surveys, including item-nonresponse, break-offs, and refusals, especially when the questions involved citizenship status. The most commonly occurring finding was that respondents appeared visibly nervous about disclosing their private information and who would have access to such data. The current political climate was of concern to respondents: in one Spanish interview, a respondent stated, "the possibility that the Census could give my information to internal security and immigration could come and arrest me for not having documents terrifies me."

56. As this finding makes clear, immigrant communities can be especially vulnerable to the social and political context surrounding the implementation of a survey. A study of immigrants in California and Texas found that respondents' fear over citizenship status correlated with their non-participation in the health sector (Berk and Schur 2001). This study found strong evidence that a threatening context can lead immigrants to withdraw and limit their access to public services, including access to medical care which they greatly needed. Likewise, anxiety and fear over immigration status has been found to reduce utilization of services related to health care, law enforcement, and education (Pedraza and Osorio 2017). In particular, research has identified the context of heightened "immigration policing" as one that erodes trust in other public institutions and creates an environment in which immigrant communities are very selective as to where, when, and how they engage with government agencies (Cruz Nichols, LeBrón and Pedraza 2018). The finding is not just limited to first-generation immigrants themselves; the research also finds a strong spillover effect to U.S.-born Latinos who have immigrant parents, or feel connected to the immigrant community, and also demonstrates non-participation during times of threatening context.

57. Studies have shown that the political context after 2016 and the election of Donald Trump has significantly diminished Latinos' trust of the federal government. For instance, Michelson and Monforti (2018) find that Latinos, including those who are undocumented, were

less trusting of government in 2016 than in 2012. In 2012, trust amongst Latinos was strong across all subgroups of Latino immigrants--- – citizens, non-citizens with legal status, and undocumented immigrants. Four years later, Latinos registered lower levels of trust in government, with fewer than 1 in 20 Latinos in any subgroup responding that they trust the government "just about always." In addition, Sanchez and Gomez-Aguinaga (2017) report that an overwhelming majority of Latinos described Trump and his policies as scary (74%), dangerous (77%), hostile (78%), and unwelcoming (80%) and they conclude that the current context is creating tension, anxiety, and nervousness among Latinos and immigrants. While the June 2019 Supreme Court decision striking the citizenship question allowed community outreach groups to push reset and create a campaign that citizenship would not be associated with the Census at all, the new PM reinjects concerns about citizenship status into the 2020 population count.

58. Beyond the Latino and immigrant communities, there is also reason to expect that increased fears about citizenship could increase non-response rates among Arab and Middle Eastern Americans. Research by Oskooii (2016) and Lajevardi and Oskooii (2018) demonstrates that American Muslims and those of Arab and Middle Eastern ancestry currently perceive a high rate of discrimination and an unwelcoming environment. Oskooii (2016) explains how perceived social exclusion can result in withdrawal and non-participation by these communities and documents this fact empirically in his published research. In research by the Center for Survey Measurement, focus groups conducted in Arabic among immigrants from the Middle East revealed the potential for Census non-response due to questions about citizenship status in light of the current political climate. (Meyers 2017). Some focus group participants referred to the "Muslim Ban" when expressing why they would be nervous about reporting their immigration and citizenship status to the federal government.

59. This context is particularly important as it relates to the issues about citizenship status, because this is the point of tension for many in the immigrant community today. That is, there is grave concern over providing information to the federal government given the perceived high rates of immigrant policing. And now that newfound distrust and fear is directly related to citizenship

status as a result of the July 21 PM, a considerable non-response is the likely outcome.

60. A clear implication identified in the relevant literature on surveys is that when respondents perceive a threatening survey, and if trust is low, non-participation will result in an inaccurate survey. Further, attempts to re-interview or re-contact households will not be successful, and some re-contact may only serve to further erode trust. Survey respondents must believe that there is no potential jeopardy before participating. Once a respondent believes that participation in the survey could bring them harm, and that the survey enumerator is acting on behalf of an official agency, attempts at repeated re-contact typically do not result in a completed survey (Ball 1967). In interviews with the enumerators themselves, there is a sense that the issues related to citizenship status will make their jobs harder, if not impossible (Meyers 2017).

61. Prior experiences with census data collection efforts that overlapped with anti-immigrant contexts provide evidence that non-response follow-up (NRFU) will be much more difficult in 2020 given the political climate and the PM. Terry et al. (2017) describe the connection between a threatening context and Census non-response in Arizona and Texas among immigrant communities: "the wider social context also had an important role in enumeration. Just before the NRFU enumeration program started in 2010, Arizona passed a very strong anti-immigration law that coincided with legal ordinances in two Dallas-area cities. These ordinances were aimed at identifying illegal immigrants through police stops or the reporting of immigration status of applicants wishing to rent apartments. The new law provoked heightened tensions around the country, particularly in the Dallas/Fort Worth-area Hispanic community. As a result, these reports conclude that non-response was high and that NRFU was less successful.

62. Undocumented immigrants may already fear providing their information to the government. They are a hard-to-reach population that is difficult for enumerators to gain access to and follow-up on in the event of non-response. To overcome these difficulties, non-governmental organizations and the Census Bureau have engaged in targeted messaging toward immigrant communities that participation in the Census would help increase access to public resources, federal funding, and political representation (Levine, 2020; Liptak et al., 2020; Smith,

2020). However, the PM, by excluding the count of undocumented immigrants from the apportionment base, completely undercuts this incentive to participate. If the government is going to remove them from the base population count, why bother filling out the 2020 Census at all? Undocumented immigrants are likely to perceive that there is no benefit to participation, as the July 21 PM states they will not count, and there is now an increased risk of their information being linked to immigration records and facing immigration enforcement.

63. It is important to note undocumented immigrants and their social ties are often risk-averse, assume the worst-case scenario, and are highly suspicious about whether their information would be shared with Federal immigration authorities (Yoshikawa, 2011; Dreby, 2015; Torres-Ardila, Bravo, and Ortiz, 2020). For example, even U.S.- citizen Latinos reduced their participation in Medicaid as a result of a punitive immigration enforcement environment (Watson, 2014; Vargas, 2015). It is unlikely Medicaid service providers will use their records to find undocumented friends or family, but the perception of legibility to immigration authorities was sufficient to produce system- avoiding behaviors. In another research paper, U.S.-born children of undocumented immigrants avoided a variety of record-keeping institutions (e.g. banking, formal employment, voter registration) as a result of their social ties with an undocumented parent (Desai, Su, and Adelman, 2019).

64. Undercounting undocumented immigrants will have spillover effects on effectively counting the broader legal non-citizen and citizen population. Mixed-status households are affected by the PM. The PM suggests the government may be using various forms of information to identify undocumented immigrants. If undocumented immigrants are the head of the household or if the head of household is responsible for undocumented immigrant friends and/or family members, they may not respond or allow themselves to be contacted by follow-up enumerators in order to protect the anonymity of their undocumented social ties. This means citizen children, documented spouses of undocumented immigrants, documented partners of undocumented immigrants, and/or documented family of undocumented immigrants will be less likely to be counted in the census.

65. One implication of the fear and unrest in the immigrant community is the increased mobility which could render any attempt at imputation or substitution incomplete and inaccurate. For imputation to work, the missing unit household cannot be vacant, and likewise cannot be a second home or vacation home of someone already counted. The missing unit household should have someone living there as their primary residence. However, as Frost notes that many undocumented immigrants who receive government letters or notices may pick-up and move their entire family, rather than wait around and figure out a way to interact with public officials. Similarly, this is documented by O'Hare (2017) who notes that Latino children are especially susceptible to being undercounted due to mobility. There is evidence that if immigrants are fearful of attempts by the federal government to obtain the personal information, identities, and citizenship statuses of all members of their household, they may vacate their homes and move to avoid being contacted again (Meyers 2017). To the extent this happens, attempts at imputation or substitution will be inaccurate, both on the national level, but especially on state and local levels.

F. When Subsequent Official Action is Taken to Remove Threats Related to Immigration Status, Immigrants Respond with Participation

66. =On January 9, 2018, a federal court in the Northern District of California issued a nationwide preliminary injunction against the Trump administration effort to phase-out DACA. The January 2018 decision allowed existing DACA recipients to apply for renewals. Later, on February 13, 2018 a second federal court in the Eastern District of New York also issued a nationwide preliminary injunction to allow DACA renewals to continue. When the court enjoined the effort by the Trump administration to repeal DACA and allowed undocumented immigrants to begin applying for DACA, there was an immediate rush of applications by undocumented immigrants who held DACA status, but were expired. According to data from the United States Customs and Immigrant Services ("USCIS"), 64,210 immigrants applied for renewal immediately after the January 2018 injunction, and 31,860 were approved by March 31,

2018 and 32,280 were pending, with only 70 having been denied.[31] Over the course of 2018, USCIS reported 287,709 total requests for DACA renewal were made by undocumented immigrants.[32] Despite additional legal challenges, throughout 2019 the injunctions from Northern California and Eastern New York remained in place nationwide and 406,586 persons applied for DACA renewals across 2019.[33] Despite the Trump administration's continued legal challenges to DACA, public statements denigrating immigrants, once the courts issued the injunctions to protect DACA, undocumented immigrants became trusting of this program,.

67. On July 2, 2015, the Priority Enforcement Program (PEP) was implemented by U.S. Immigration and Customs Enforcement (ICE). It was announced by then-DHS Secretary Jeh Johnson in a November 2014 memo, and was meant to replace the then-existing Secure Communities program, which coordinated local police databases with ICE. PEP implemented a series of mandates that immigration enforcement should prioritize individuals who have engaged in serious criminal activity or who pose national security threats. In short, it mandated that ICE cast a smaller net in identifying, detaining, and deporting undocumented immigrants. In addition, PEP made it more difficult for ICE to execute immigration detainers. ICE had to state probable cause (via reference to the priorities) in order to execute a detainer in addition to the local law enforcement agency having to serve a copy of the detainer request on the individual in order for it to take effect. The intent of the new policy was for police to collaborate less with ICE and to only focus their detention efforts on serious criminals. The Dallas County Sheriff, which controls the county jails and oversees the processing of immigrants detained agreed to participate in the PEP program to reduce the local prominence of ICE in Dallas.[34] A research paper

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[31] Approximate Count of DACA Receipts: Since January 10, 2018, As of Mar. 31, 2018
https://www.uscis.gov/sites/default/files/document/data/DACA_Receipts_Since_Injunction_Mar_31_2018.pdf

[32] Number of Form I-821D,Consideration of Deferred Action for Childhood Arrivals, Status, by Fiscal Year, Quarter, and Case Status: Aug. 15, 2012-Mar. 31, 2020
https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2020_qtr2.pdf

[33] Number of Form I-821D,Consideration of Deferred Action for Childhood Arrivals, Status, by Fiscal Year, Quarter, and Case Status: Aug. 15, 2012-Mar. 31, 2020
https://www.uscis.gov/sites/default/files/document/data/DACA_performancedata_fy2020_qtr2.pdf

[34] Dallas county jails complied with the PEP. Dallas County Sheriff Lupe Valdez formally agreed to participate in the program after meeting with ICE representatives in July and August 2015. In August 2015, Dallas County

analyzing Dallas Police Department (DPD) police reports finds clear evidence that the implementation of PEP increased crime reporting to DPD by Hispanic and immigrant subjects in Dallas.[35] The data shows Hispanic and immigrant engagement with police increased significantly in the immediate quarter after PEP was implemented. And in the six quarters following the change in policy, Hispanics and immigrants voluntarily reported around 6,000 more incidents to the police than they would have been if the enforcement priorities had not changed. Thus, reversals or limitations imposed on executive actions may have measurable consequences on promoting trust among immigrant communities and influencing behavioral interactions with various aspects of government.

68. In prior survey research in 2018 to test the impact of a citizenship question being included or excluded from the 2020 Census, there was a clear finding of increased Census participation after removing any fear of immigration status being exposed.[36] Initially, after being told about the citizenship question, a sizable share of respondents said they would not participate in the 2020 Census. Later in the survey, respondents were randomly assigned to a condition in which they were told the government changed their mind and a citizenship question would NOT be included after all. A second set of participants were randomly assigned to a condition in which it was reaffirmed that the government would in fact include a citizenship question.

90. **Table 7: Percent of Non-Responders Who Change to Responders at Q7 / Q8**

	Total	White	Latino	Black	AAPI	Other
Q8 Yes – with citizenship	45.2	49.5	38.9	62.2	0.2	17.2
Q7 Yes – without citizenship	84.3	89.3	80.1	78.6	53.3	94.9
Difference	-39.1	-39.7	-41.2	-16.5	-53.1	-77.7

officials began reviewing ICE's request prior to honoring them with the vetting guidelines being similar to PEP priorities, ensuring only individuals who posed a threat to public safety were transferred to ICE's custody. This is evidenced in data by Jacome (2018), who finds total detainers dropped by roughly 1,000 by the end of 2015 due to decreases in detainers issued for individuals convicted of misdemeanors and those with no conviction.

[35] Jacome, Elisa. "The Effect of Immigration Enforcement on Crime Reporting: Evidence from the Priority Enforcement Program." *Available at SSRN 3263086* (2018).

[36] *See* Tr. 687-89; Trial Ex. 677, *NY v. Dep't Commerce,* 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff'd* 139 S. Ct. 2551 (2019). Barreto expert declaration NY v. Dept Commerce, September 7, 2018.

Among Latinos who said they would **not** participate in the census with a citizenship question, 80 percent changed their mind and said they **would** participate once they learned that the citizenship question would be removed. The mechanism here is whether or not those in the immigrant community believe their participation creates increased risk of exposing themselves to immigration enforcement. Members of immigrant communities are very concerned about their citizenship status being monitored or revealed. When they believe the threat is real, they will withdraw from the Census, and when that threat has been removed, they reengage. This provides very strong evidence that when fears about citizenship status being revealed are removed, a large share of Latinos will indeed increase their participation in Census 2020.[37]

69. Across the wide-ranging literature, a key finding is that immigrants are normally eager to engage in public life and with political institutions, but when there is a threat of negative consequences for their immigration status, avoidance behavior is likely. (e.g. Garcia 2019).

G. Non-Response Follow-Up (NRFU) and Imputation of Non-Responding Households

70. The Census Bureau is aware that some households will not respond to the initial request for participation, and as such they have long had a program called Non-Response Follow-Up (NRFU) which provides follow-up contact with any households that do not initially respond. The Census Bureau estimates they conducted follow-up with around 50 million households in 2010 (Rao 2017). NRFU is critical for the Census Bureau to increase participation rates, but it is a costly and difficult undertaking by their own admission. Any increased non-response at initial contact makes NRFU much more difficult, especially if non-responding households come to not trust the survey questions that enumerators are attempting to ask. What's more, NRFU is now profoundly more difficult due to COVID-19 and the time available has been shortened. As discussed in this report, the PM increases the likelihood that Latinos, immigrants, and noncitizens are less likely to self-respond to the 2020 census. These non-responding individuals are also unlikely to respond

[37] *See id.*

after household visits by census enumerators because of fear of government interaction. (de la Puente 1995; 2004).

71. In fact, with the new focus on excluding undocumented immigrants directed by the PM, the Census outreach efforts after July 21, 2020 could actually create more fear and anxiety in immigrant communities and further drive down response rate and increase the net undercount. For example, the Census Bureau plans to send enumerators into non-responding communities on behalf of the federal government, and if nobody is home, they will leave a "Notice of Visit" from the federal government which includes a unique household "census identification number." Further, they inform the household that additional visits will be made back to their house by enumerators on behalf of the federal government. This sends a clear signal of federal government monitoring of the household and will result in increased anxiety and concern over cooperating (e.g. Menjívar 2011; Szkupinski Quiroga et al. 2014). Research by Hagan et al. (2011) documents with clear evidence the extensive chilling effect of increased presence of government officials who appear to be monitoring immigrants and checking on their status. They find immigrants "withdrawing from the community" as well as "avoiding public places" and that they "spend most of their non-working hours in their homes because it is the safest way to avoid detection." (Hagan et al. 2011.) According to Abrego (2011), undocumented immigrants will go to great lengths to reduce their visibility in society when they perceive a potential threat of deportation. Her research identifies withdrawal from interactions with government agencies as awareness of immigration checks increases. From the perspective of an anxious immigrant, each additional household visit from a government Census worker, following a PM directing the exclusion of undocumented people, is the exact environment that would produce withdrawal. According to Abrego: "In effect, their well-being and stability are perennially threatened because, as they are constantly reminded, there may be an ICE raid. . . at any time" (2011).

72. Research also finds that increased presence and visibility of government officials who appear to be collecting immigration information creates withdrawal and also misreporting on government forms (Rodriguez and Hagan 2004). Increased presence of immigration officials in

the community lead to a decline of student attendance in the nearby school to avoid any contact with the government officials. However, in communities without ICE presence, school attendance is not impacted. The research study observed this trend across three different cities in Texas and attributed increased withdrawal to an increased visibility and presence of government officials asking about immigration status. Further, the same study reported that Hispanics began to change their racial identification to White on government forms at health clinics to avoid any risk of association with immigration officials (Rodriguez and Hagan 2004).

73. Another study specifically examined the willingness of immigrants to participate in surveys and data collection efforts, in particular examining how fear of deportation impacted response rates and general engagement with government services (Arbona et al. 2010). One of the most important findings of this study was that if immigrants fear their participation could somehow lead to their deportation, they will not participate unless they are fully comfortable and trusting of the survey taker. As the research study progressed, Arbona et al. reported, through quantitative data, that fear of deportation was a strong motivating factor for avoidance and that over 80% of immigrants in their sample stated that they avoided activities such as "ask[ing] for help from government agencies, report[ing] an infraction to the police, attend[ing] court if requested to do so," and other items. The more census enumerators visit immigrant communities to attempt household counts, following the July 21 PM to exclude undocumented immigrants, the more likely they will be to not participate. That is, the outreach itself will produce further non-response as a result of the socio-political climate following the PM.

74. NRFU enumerators may not be able to make contact with adult households. Enumerators may not be sufficiently linguistically or culturally competent in order to persuade undecided households to respond. For example, they may not be able to effectively convince Latinos who may be concerned about immigration issues or enforcement to respond. Many Latinos, in the context of heightened immigration enforcement, are told to not open the door to strangers due to commercial scams and guidance from immigration legal advisors regarding ICE visits (Kissam et al., 2019). Moreover, even if enumerators are able to convince members of

immigrant communities to respond despite the existence of a chilling effect, it may be logistically difficult for enumerators to make contact with adult householders. In many immigrant communities, work hours are long and weekend work is common, increasing the difficulty for NRFU enumerators to conduct a direct interview of the household (Kissam et al., 2019).

75. NRFU also cannot account for households omitted from the Master Address File as a result of "complex households" in low-visibility unconventional and/or hidden housing units (Kissam, 2019). These complex households may be more likely to be made up of immigrants and their direct social ties. Kissam (2019) notes in the San Joaquin Valley, only 95% of the Latino immigrant study population live in housing units included in the Census Bureau's Master Address File, resulting in a 5% household omission rate. The only way these households can be counted in the Census is if they proactively respond via online non-ID processing operations or by phone. However, these alternative mechanisms may not work if these complex households are concerned about the prospect of providing information to a government seeking to identify their citizenship status or exclude them from the count for specific purposes, such as apportionment, as required by the PM.

76. Even if NRFU results in data production, it may be faulty data. High levels of non-response force the Census Bureau to rely on alternative statistical procedures such as triangulation via administrative records, proxy interviews with neighbors, and, imputation. Some of these alternative efforts might fail in immigrant communities. Proxy interviews may fail to resolve undercounting due to mistrust of Federal authorities and lack of willingness to provide information on neighbors. Indeed, only 17% of respondents in a survey of the San Joaquin Valley immigrant community indicated they were willing to provide an enumerator with information about neighbors in the San Joaquin Valley (Kissam, 2019). It is important to note proxy interview efforts are error-prone, since they are, at best, estimates by neighbors of the number and characteristics of neighboring households. The same survey of immigrant communities in the San Joaquin Valley indicates less than half of potential Census respondents believe they know enough about their

neighbors to provide accurate responses (Kissam, 2019).

77. Moreover, finding administrative records that match households is likely to be more difficult for immigrant households, who may be less prone to providing personal or household information to various aspects of government and may not be eligible for a variety of government programs that keep records (Kissam, 2019; Asad, 2020). While the Trump administration may assume they can rely on administrative records, the reality is that this creates major methodological problems for NRFU and then imputation. The data is fraught with errors and inconsistencies and will lead to lower quality data and undercounts. Research by Bhaskar, Fernandez, and Porter (2018), who are Census Bureau researchers, indicates matching an administrative record to a household requires a Personal Identification Key (PIK). They also find foreign-born households are less likely to have a PIK than U.S.-born households. Lack of having a PIK is associated with more people in a household, living in a Census tract with a high density of foreign-born individuals, Latino/Hispanic race/ethnicity, non-citizen status, limited English or no English proficiency, and being a recent immigrant. IRS administrative records may not serve as effective proxies for enumeration given not all undocumented immigrants file income tax returns on a regular basis (Gee, Gardner, and Wiehe, 2016). Social Security Administration (SSA) records may be incomplete if immigrant workers have only worked in the informal or underground economy. Parents also may never apply for an SSN for foreign-born children without legal status. Foreign-born non-working spouses may have never applied for an SSN (Kissam, 2019). Often, the use of borrowed SSNs is prevalent among immigrant workers, which may result in potential undercounts or discrepancies in the count. Moreover, employer reports of employee's earnings do not provide reliable or exhaustive information on household size.

78. Even if a match to an administrative record is found for a specific address, it may not accurately enumerate household size and composition because the record may be out of date or exclude peripheral household members who are not part of the primary core family living in the housing unit (Kissam, 2019). There may be discrepancies via administrative matching in neighborhoods where low-income renter households move often and administrative records may

not update frequently in immigrant communities such that newly born children will be disproportionately omitted (Kissam, 2019). If information via administrative records or proxy interviews do not bear fruit, the Census Bureau may attempt to use hot-deck imputation to determine the characteristics of households that did not respond. The problem is that non-responding households in immigrant communities may be systematically larger than those that do respond. Thus, each imputation will contribute to a differential undercut given that "donor" households have less inhabitants (Kissam, 2019).

79. In addition to trying to match households to their administrative records, the Census Bureau has indicated that it may employ statistical imputation techniques to address nonresponse. During the collection of any survey, two types of nonresponse can emerge: unit nonresponse and item nonresponse. Unit nonresponse concerns an entire missing case resulting from either non-contact, refusal, or inability to participate. Item nonresponse concerns missing values on certain questions in the survey. Bias, or incorrect and faulty data, can emerge from nonresponse when the causes of the nonresponse are linked to the survey statistics being measured, which is referred to as nonignorable nonresponse (Groves et al 2004). By way of illustration, public health officials designed a survey to measure the prevalence of HIV in the population during the early days of the HIV epidemic. Despite incentives, cooperation rates among those who were HIV-positive were extremely low because of the stigma of the disease. Thus, the key statistic sought – namely, the percentage of HIV-positive people – was causally related to the likelihood of self-response; specifically, in that case, those who were HIV-positive did not want to participate in the study at all. Non-ignorable nonresponse is particularly egregious because even if the causal influence is known "there is no way that the statistic among respondents can be made free of nonresponse bias (without making heroic assumptions about the status of the nonrespondents)" (Groves et al. 2004). What this means is that if a factor influencing the decision to not respond is correlated with an important outcome variable, imputation is impractical because you cannot observe the existence of the precise variable you are trying to count. In the case of the 2020 Census, the key outcome variable is producing an accurate count of total household size; yet, prior research establishes that

larger households are more likely to not respond when the responder's citizenship status may be implicated. Thus, the decision whether to respond is correlated with household size, a key outcome variable of interest.

80. Some statistical tools are available to deal with nonresponse. At one end of the spectrum, if every variable of interest is known for the nonrespondent, except one, then we can use these variables to form an imputation model that will predict a value for the missing value – for example, we may know the existence of the respondent and that person's age, but may not know their income level and can use predictive models to impute income for that respondent. At the other end of the spectrum we have entire missing cases (unit nonresponse), where the existence of the person is unknown. Imputation for unit nonresponse, sometimes called "whole person imputation," is used almost exclusively in longitudinal surveys where ample data from prior waves exists for a missing respondent. It is extremely rare to impute for unit nonresponse if little is known about the nonrespondent case (Groves and Couper 1998). Unit nonresponse is typically dealt with by some form of post-stratification or response rate weighting adjustment[38] (Kalton 1983). While imputation can be useful for missing values in an otherwise completed survey form (item nonresponse), it is particularly problematic for imputing the existence of whole persons, and is especially likely to end up with an undercount in vulnerable communities. This is part of the reason that social scientists and government statisticians want the decennial census to be as non-burdensome and non-sensitive as possible, to ensure an overall accurate count through high rates of participation (Wines 2018).

81. In general, whole-person imputation itself relies on a number of assumptions to work correctly. If data is missing completely at random (MCAR) (Rubin 1976), then non-response generally introduces less bias. Models are of less help with non-ignorable nonresponse, as noted above, where nonresponse depends on the values of a response variable. In this case, models can

[38] After the survey data are collected, statisticians can use the known universe of respondent demographics to apply weights and possibly correct for non-response, however this only corrects the dataset for use in a data analysis project or academic research paper, not necessarily population counts, which are supposed to serve as the baseline universe estimate in the first place.

help but never eliminate all nonresponse bias (Lohr 1999). Indeed, recent reviews of cutting edge imputation procedures like "hot deck imputation" argue that "hot deck" methods for situations where nonresponse is non-ignorable have not been well explored (Andridge and Little 2010). Whole person imputation, then, has its dangers. The Census Bureau currently acknowledges that "whole person substitutions and whole person imputations are not very accurate." (See Abowd 30(b)(6) Deposition 2018)

82. With respect to the U.S. census and counts of Latino and immigrant households, previous research has shown that whole person imputation efforts are seriously error-prone. Because family arrangements, housing styles and total household sizes vary considerably, attempts to impute the population of non-respondent households have been shown to undercount the population (Kissam 2017). First, many non-traditional housing units are simply not included in the imputation, leaving them as vacant when in reality they had tenants or dwellers. Second, the household size of missing units tends to be larger, on average, than of reported units. Reports also document differences by socioeconomic status. The end result is that even with imputation, there can still be a significant undercount of the Latino immigrant population.

83. Beyond the raw count being inaccurate, there is also evidence of misattribution of those imputed, because they rely on higher acculturated units for which there is data to make adjustments (i.e. substituting data on U.S.-born, English-speaking and college educated households when in fact missing cases are more likely to be foreign-born, Spanish-speaker, less educated households), suggesting the imputed data do not accurately describe the true population (Kissam 2017). The U.S. Government Accountability Office has itself admitted this is a problem with respect to getting a complete count of Latinos. In the 2003 report on trying to improve the Latino count, they wrote "even with the Bureau's guidelines and training, deciding whether a house is unfit for habitation or merely unoccupied and boarded-up can be very difficult. An incorrect decision on the part of the census worker could have caused the dwelling and its occupants to get missed by the census." U.S GAO Report (2003) (GAO-03-605).

84. By examining data from a prior 2018 survey specifically about the Census, we can

conclude that unit non-response on the 2020 census will not be at random. Households that do not respond and represent missing units, are certain to have very different characteristics and demographics than the households that do respond. In this event, it makes it nearly impossible to impute or infer the population totals or any other demographic information about missing units (e.g. missing households) because we do not have enough reliable information on "matched" or similar units. Further, it is quite likely that unit non-response in 2020 will be clustered geographically, meaning that there will be fewer available adjacent units for imputation, and that analysts will have to rely on dissimilar households for imputation, thus violating the most important assumption needed for accurate imputation. In particular, non-responders were found more likely in dense urban areas and locales with high numbers of renters. These factors are known to be related to census undercounts and make NRFU difficult and result in erroneous imputation (U.S. GAO Report, 2003).

85. It is virtually certain that the reduced self-response caused by the July 21 PM related to citizenship status will lead to a net undercount among those populations with lower rates of self-response. Previous census reports have documented that high rates of non-response to the initial questionnaire result in undercounts, and that NRFU is not always successful in converting those cases into respondents. In addition, matching household to administrative records can be an unreliable method of enumerating the household, particularly for immigrant communities. Prior census reports have also documented that errors are made in imputation and that undercounts persist even after attempted imputation. Ultimately, the worse the initial non-response is, the worse the initial undercount is, making it increasingly more difficult to convert those cases into responding cases, and increasing more difficult to impute missing units (US Census Bureau 2017b; National Research Council 2002; 2004).

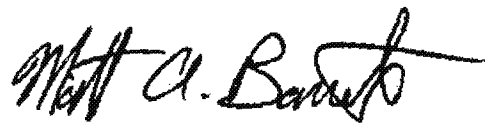
86. This problem has been documented to be worse in Latino and immigrant communities where the Census admits the undercount is problematic, and that their efforts at NRFU and imputation have errors (Ericksen and Defonso 1993; O'Hare et al. 2016). One primary reason is that issues related to trust of government officials significantly hampers the NRFU process, and in

2020 the citizenship question will greatly exacerbate issues of trust in immigrant communities (See section below "Perceptions of Trust and Confidentiality" at paragraph 96). In particular, young children in Latino households have been found to be regularly undercounted by previous census efforts and that imputation methods do not appropriately find or count this population. The best assurance for an accurate count is high response rates on the initial census request for participation, which requires a high degree of trust (O'Hare et al. 2016; Casey Foundation 2018). Previous self-reports by the Census Bureau are clear: immigrant communities are already at-risk of an undercount because of lower levels of trust of government officials, and have particular anxiety over citizenship information being shared. What's more, these previous census reports have documented that low self-participation on round one of invitations ultimately leads to an undercount that no amount of NRFU, administrative-record matching, or imputation can correct. In 2020, the PM will only create more problems, more anxiety in immigrant communities, and less self-participation on round one. With nearly 17 million people, including 6 million citizen children, living in households with at least one person who is an undocumented immigrant (Casey Foundation 2018), there is enormous potential for a massive non-response with a newly created anxiety over citizenship status as a result of the July PM.

87. After reviewing defendants report(s), I plan to offer rebuttal opinions as requested by plaintiffs.

Executed on August 7, 2020 at Agoura Hills, CA.

I declare under penalty of perjury that the foregoing is true and correct.



Matthew A. Barreto

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Appendix A

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Associate Professor (2009 – 2014)
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Co-Founder & Director, Washington Institute for the Study of Ethnicity and Race
Founding Director, Center for Democracy and Voting Rights, UW School of Law

Affiliated Research Centers

Latino Policy & Politics Initiative (LPPI), University of California, Los Angeles

Chicano Studies Research Center (CSRC), University of California, Los Angeles

Center for the Study of Los Angeles (CSLA), Loyola Marymount University

PERSONAL:

Born: June 6, 1976
San Juan, Puerto Rico

High School: 1994, Washburn Rural HS, Topeka, KS

EDUCATION:

Ph.D., Political Science, June 2005
University of California – Irvine
Sub Fields: American Politics / Race, Ethnicity and Politics / Methodology
Thesis: Ethnic Cues: The Role of Shared Ethnicity in Latino Political Participation
Thesis Committee: Bernard Grofman (chair), Louis DeSipio, Katherine Tate, Carole Uhlaner
Thesis Awards: *Ford Foundation Dissertation Fellowship for Minorities, 04-05*
University of California President's Dissertation Fellowship, 04-05
University of California Institute for Mexico & the U.S. Dissertation Grant, 04-05

Master of Science, Social Science, March 2003
University of California – Irvine

Bachelor of Science, Political Science, May 1998
Eastern New Mexico University, Portales, NM
Minor: English. Cumulative GPA: 3.9, *Summa Cum Laude*

PUBLICATION RECORD

Google Scholar citation indices: Cites: 3,768 h-index: 28 i10-index: 54 Years post-PhD: 15 Cites/year: 236

BOOK MANUSCRIPTS:

Barreto, Matt and Christopher Parker. nd. The Great White Hope: Donald Trump, Race, and the Crisis of American Politics. Under Contract, University of Chicago Press. *expected Fall 2020*

Barreto, Matt and Gary Segura. 2014. Latino America: How America's Most Dynamic Population is Poised to Transform the Politics of the Nation. Public Affairs Books. (Sept)

Barreto, Matt and David Leal, editors. 2018. Race, Class, and Precinct Quality in American Cities. Springer Press.

Christopher Parker and Matt Barreto. 2013. Change They Can't Believe In: The Tea Party and Reactionary Politics in America. Princeton University Press. *Winner: APSA Best Book Award for Race, Ethnicity, Politics, 2014*

Barreto, Matt. 2010. Ethnic Cues: The Role of Shared Ethnicity in Latino Political Participation. University of Michigan Press

PEER-REVIEWED ARTICLES

73. Reny, Tyler and Matt A. Barreto. 2020. "Xenophobia in the time of pandemic: othering, anti-Asian attitudes, and COVID-19 " *Politics, Groups, and Identities*. 8(2).

72. Flores, Lucy and Matt A. Barreto. 2020. "Latina Voters: The key electoral force" *Journal of Cultural Marketing Strategy*. 4(2).

71. Frasure-Yokley, Lorrie, Janelle Wong, Edward Vargas and Matt A. Barreto 2020. "THE COLLABORATIVE MULTIRACIAL POST-ELECTION SURVEY (CMPS): BUILDING THE ACADEMIC PIPELINE THROUGH DATA ACCESS, PUBLICATION, AND NETWORKING OPPORTUNITIES" *PS: Political Science & Politics.* 53(1)

70. Barreto, Matt, Loren Collingwood, Sergio Garcia-Rios and Kassra Oskooii. 2019. "Estimating Candidate Support: Comparing Iterative EI and EI-RxC Methods" *Sociological Methods and Research*. 48(4).

69. Gonzalez-OBrien, Benjamin, Matt Barreto and Gabriel Sanchez. 2019. "They're All Out to Get Me! Assessing Inter-Group Competition Among Multiple Populations." *Politics, Groups and Identities*. 7(4).

68. Oskooii, Kassra, Karam Dana and Matt Barreto. 2019. "Beyond generalized ethnocentrism: Islam-specific beliefs and prejudice toward Muslim Americans." *Politics, Groups and Identities* 7(3)

67. Vargas, Edward, Gabriel Sanchez, Barbara Gomez-Aguinaga, and Matt Barreto. 2019. "How Latinos' Perceptions of Environmental Health Threats Impact Policy Preferences." *Social Science Quarterly.* 101(1).

66. Walker, Hannah, Marcel Roman and Matt Barreto. 2019. "The Direct and Indirect Effects of Immigration Enforcement on Latino Political Engagement." *UCLA Law Review.* 67.

65. Gutierrez, Angela, Angela Ocampo, Matt Barreto, and Gary Segura. 2019. "Somos Más : How Racial Threat and Anger Mobilized Latino Voters in the Trump Era" *Political Research Quarterly.* 72(4)

64. Chouhoud, Youssef, Karam Dana, and Matt Barreto. 2019. "American Muslim Political Participation: Between Diversity and Cohesion." *Politics and Religion*. 12(S3).

63. Barreto, Matt, Stephen Nuño, Gabriel Sanchez, and Hannah Walker. 2019. "Race, Class and Barriers to Voting in the 21st Century: The Unequal Impact of Voter ID Laws." *American Politics Research*

62. Barreto, Matt. 2018. "The cycle of under-mobilization of minority voters: A comment on 'Selective recruitment of voter neglect?'" *Journal of Race, Ethnicity, and Politics.* 3(1).

61. Ocampo, Angela, Karam Dana and Matt Barreto. 2018. "The American Muslim Voter: Community Belonging and Political Participation." *Social Science Research.* 69(4).

60. Barreto, Matt, Lorrie Frasure-Yokley, Edward Vargas, Janelle Wong. 2018. "Best practices in collecting online data with Asian, Black, Latino, and White respondents: evidence from the 2016 Collaborative Multiracial Post-election Survey." *Politics, Groups & Identities.* 6(1).

59. Barreto, Matt, Tyler Reny and Bryan Wilcox-Archuleta. 2017. "A debate about survey research methodology and the Latina/o vote: why a bilingual, bicultural, Latino-centered approach matters to accurate data." *Aztlán: A Journal of Chicano Studies.* 42(2).

58. Barreto, Matt and Gary Segura. 2017. "Understanding Latino Voting Strength in 2016 and Beyond: Why Culturally Competent Research Matters." *Journal of Cultural Marketing Strategy.* 2:2

57. Dana, Karam, Bryan Wilcox-Archuleta and Matt Barreto. 2017. "The Political Incorporation of Muslims in America: The Mobilizing Role of Religiosity in Islam." *Journal of Race, Ethnicity & Politics.*

56. Collingwood, Loren, Kassra Oskooii, Sergio Garcia-Rios, and Matt Barreto. 2016. "eiCompare: Comparing Ecological Inference Estimates across EI and EI: RxC." *The R Journal.* 8:2 (Dec).

55. Garcia-Rios, Sergio I. and Matt A. Barreto. 2016. "Politicized Immigrant Identity, Spanish-Language Media, and Political Mobilization in 2012" *RSF: The Russell Sage Foundation Journal of the Social Sciences*, 2(3): 78-96.

54. Barreto, Matt, Collingwood, Loren, Christopher Parker, and Francisco Pedraza. 2015. "Racial Attitudes and Race of Interviewer Item Non-Response." *Survey Practice.* 8:3.

53. Barreto, Matt and Gary Segura 2015. "Obama y la seducción del voto Latino." *Foreign Affairs Latinoamérica.* 15:2 (Jul).

52. Barreto, Matt and Loren Collingwood 2015. "Group-based appeals and the Latino vote in 2012: How immigration became a mobilizing issue." *Electoral Studies.* 37 (Mar).

51. Collingwood, Loren, Matt Barreto and Sergio García-Rios. 2014. "Revisiting Latino Voting: Cross-Racial Mobilization in the 2012 Election" *Political Research Quarterly.* 67:4 (Sep).

50. Bergman, Elizabeth, Gary Segura and Matt Barreto. 2014. "Immigration Politics and Electoral Consequences: Anticipating the Dynamics of Latino Vote in the 2014 Election" *California Journal of Politics and Policy.* (Feb)

49. Barreto, Matt and Sergio García-Rios. 2012. "El poder del voto latino en Estados Unidos en 2012" *Foreign Affairs Latinoamérica.* 12:4 (Nov).

48. Collingwood, Loren, Matt Barreto and Todd Donovan. 2012. "Early Primaries, Viability and Changing Preferences for Presidential Candidates." *Presidential Studies Quarterly.* 42:1(Mar).

47. Barreto, Matt, Betsy Cooper, Ben Gonzalez, Chris Towler, and Christopher Parker. 2012. "The Tea Party in the Age of Obama: Mainstream Conservatism or Out-Group Anxiety?." *Political Power and Social Theory.* 22:1(Jan).

46. Dana, Karam, Matt Barreto and Kassra Oskoii. 2011. "Mosques as American Institutions: Mosque Attendance, Religiosity and Integration into the American Political System." *Religions.* 2:2 (Sept).

45. Barreto, Matt, Christian Grose and Ana Henderson. 2011. "Redistricting: Coalition Districts and the Voting Rights Act." *Warren Institute on Law and Social Policy.* (May)

44. Barreto, Matt and Stephen Nuño. 2011. "The Effectiveness of Co-Ethnic Contact on Latino Political Recruitment." *Political Research Quarterly.* 64 (June). 448-459.

43. Garcia-Castañon, Marcela, Allison Rank and Matt Barreto. 2011 "Plugged in or tuned out? Youth, Race, and Internet Usage in the 2008 Election." *Journal of Political Marketing.* 10:2 115-138.

42. Barreto, Matt, Victoria DeFrancesco, and Jennifer Merolla. 2011 "Multiple Dimensions of Mobilization: The Impact of Direct Contact and Political Ads on Latino Turnout in the 2000 Presidential Election." *Journal of Political Marketing.* 10:1

41. Barreto, Matt, Loren Collingwood, and Sylvia Manzano. 2010. "Measuring Latino Political Influence in National Elections" *Political Research Quarterly.* 63:4 (Dec)

40. Barreto, Matt, and Francisco Pedraza. 2009. "The Renewal and Persistence of Group Identification in American Politics." *Electoral Studies.* 28 (Dec) 595-605

39. Barreto, Matt and Dino Bozonelos. 2009. "Democrat, Republican, or None of the Above? Religiosity and the Partisan Identification of Muslim Americans" *Politics & Religion* 2 (Aug). 1-31

38. Barreto, Matt, Sylvia Manzano, Ricardo Ramírez and Kathy Rim. 2009. "Immigrant Social Movement Participation: Understanding Involvement in the 2006 Immigration Protest Rallies." *Urban Affairs Review.* 44: (5) 736-764

37. Grofman, Bernard and Matt Barreto. 2009. "A Reply to Zax's (2002) Critique of Grofman and Migalski (1988): Double Equation Approaches to Ecological Inferences." *Sociological Methods and Research.* 37 (May)

36. Barreto, Matt, Stephen Nuño and Gabriel Sanchez. 2009. "The Disproportionate Impact of Voter-ID Requirements on the Electorate – New Evidence from Indiana." *PS: Political Science & Politics.* 42 (Jan)

35. Barreto, Matt, Luis Fraga, Sylvia Manzano, Valerie Martinez-Ebers, and Gary Segura. 2008. "Should they dance with the one who brung 'em? Latinos and the 2008 Presidential election" *PS: Political Science & Politics.* 41 (Oct).

34. Barreto, Matt, Mara Marks and Nathan Woods. 2008. "Are All Precincts Created Equal? The Prevalence of Low- Quality Precincts in Low-Income and Minority Communities." *Political Research Quarterly.* 62

33. Barreto, Matt. 2007. "*Sí Se Puede!* Latino Candidates and the Mobilization of Latino Voters." *American Political Science Review.* 101 (August): 425-441.

32. Barreto, Matt and David Leal. 2007. "Latinos, Military Service, and Support for Bush and Kerry in 2004." *American Politics Research.* 35 (March): 224-251.

31. Barreto, Matt, Mara Marks and Nathan Woods. 2007. "Homeownership: Southern California's New Political Fault Line?" *Urban Affairs Review.* 42 (January). 315-341.

30. Barreto, Matt, Matt Streb, Fernando Guerra, and Mara Marks. 2006. "Do Absentee Voters Differ From Polling Place Voters? New Evidence From California." *Public Opinion Quarterly.* 70 (Summer): 224-34.

29. Barreto, Matt, Fernando Guerra, Mara Marks, Stephen Nuño, and Nathan Woods. 2006. "Controversies in Exit Polling: Implementing a racially stratified homogenous precinct approach." *PS: Political Science & Politics.* 39 (July) 477-83.

28. Barreto, Matt, Ricardo Ramírez, and Nathan Woods. 2005. "Are Naturalized Voters Driving the California Latino Electorate? Measuring the Impact of IRCA Citizens on Latino Voting." *Social Science Quarterly.* 86 (December): 792-811.

27. Barreto, Matt. 2005. "Latino Immigrants at the Polls: Foreign-born Voter Turnout in the 2002 Election." *Political Research Quarterly.* 58 (March): 79-86.

26. Barreto, Matt, Mario Villarreal and Nathan Woods. 2005. "Metropolitan Latino Political Behavior: Turnout and Candidate Preference in Los Angeles." *Journal of Urban Affairs.* 27(February): 71-91.

25. Leal, David, Matt Barreto, Jongho Lee and Rodolfo de la Garza. 2005. "The Latino Vote in the 2004 Election." *PS: Political Science & Politics.* 38 (January): 41-49.

24. Marks, Mara, Matt Barreto and Nathan Woods. 2004. "Harmony and Bliss in LA? Race and Racial Attitudes a Decade After the 1992 Riots." *Urban Affairs Review.* 40 (September): 3-18.

23. Barreto, Matt, Gary Segura and Nathan Woods. 2004. "The Effects of Overlapping Majority-Minority Districts on Latino Turnout." *American Political Science Review.* 98 (February): 65-75.
22. Barreto, Matt and Ricardo Ramírez. 2004. "Minority Participation and the California Recall: Latino, Black, and Asian Voting Trends 1990 – 2003." *PS: Political Science & Politics.* 37 (January): 11-14.

21. Barreto, Matt and José Muñoz. 2003. "Reexamining the 'politics of in-between': political participation among Mexican immigrants in the United States." *Hispanic Journal of Behavioral Sciences.* 25 (November): 427-447.

20. Barreto, Matt. 2003. "National Origin (Mis)Identification Among Latinos in the 2000 Census: The Growth of the "Other Hispanic or Latino" Category." *Harvard Journal of Hispanic Policy.* 15 (June): 39-63.

Edited Volume Book Chapters

19. Barreto, Matt and Gary Segura. 2020. "Latino Reaction and Resistance to Trump: Lessons learned from Pete Wilson and 1994." In Raul Hinojosa and Edward Telles (eds.) Equitable Globalization: Expanding Bridges, Overcoming Walls. Oakland: University of California Press.

18. Barreto, Matt, Albert Morales and Gary Segura. 2019. "The Brown Tide and the Blue Wave in 2018" In Larry Sabato, Kyle Kondik, Geoffrey Skelley (eds.) The Blue Wave. New York: Rowman & Littlefield.

17. Gutierrez, Angela, Angela Ocampo and Matt Barreto. 2018. "Obama's Latino Legacy: From Unknown to Never Forgotten" In Andrew Rudalevige and Bert Rockman (eds.) The Obama Legacy. Lawrence, KS: University of Kansas Press.

16. Barreto, Matt, Thomas Schaller and Gary Segura. 2017. "Latinos and the 2016 Election: How Trump Lost Latinos on Day 1" In Larry Sabato, Kyle Kondik, Geoffrey Skelley (eds.) Trumped: The 2016 Election that Broke All the Rules. New York: Rowman & Littlefield.

15. Walker, Hannah, Gabriel Sanchez, Stephen Nuño, Matt Barreto 2017. "Race and the Right to Vote: The Modern Barrier of Voter ID Laws" In Todd Donovan (ed.) Election Rules and Reforms. New York: Rowman & Littlefield.

14. Barreto, Matt and Christopher Parker. 2015. "Public Opinion and Reactionary Movements: From the Klan to the Tea Party" In Adam Berinsky (ed.) New Directions in Public Opinion. 2nd edition. New York: Routledge Press.

13. Barreto, Matt and Gabriel Sanchez. 2014. "A 'Southern Exception' in Black-Latino Attitudes?." In Anthony Affigne, Evelyn Hu-Dehart, Marion Orr (eds.) Latino Politics en Ciencia Política. New York: New York University Press.

12. Barreto, Matt, Ben Gonzalez, and Gabriel Sanchez. 2014. "Rainbow Coalition in the Golden State? Exposing Myths, Uncovering New Realities in Latino Attitudes Towards Blacks." In Josh Kun and Laura Pulido (eds.) Black and Brown in Los Angeles: Beyond Conflict and Coalition. Berkeley, CA: University of California Press.

11. Barreto, Matt, Loren Collingwood, Ben Gonzalez, and Christopher Parker. 2011. "Tea Party Politics in a Blue State: Dino Rossi and the 2010 Washington Senate Election" In William Miller and Jeremy Walling (eds.) Stuck in the Middle to Lose: Tea Party Effects on 2010 U.S. Senate Elections. Rowman & Littlefield Publishing Group.

10. Jason Morin, Gabriel Sanchez and Matt Barreto. 2011. "Perceptions of Competition Between Latinos and Blacks: The Development of a Relative Measure of Inter-Group Competition." In Edward Telles, Gaspar Rivera-Salgado and Mark Sawyer (eds.) Just Neighbors? Research on African American and Latino Relations in the US. New York: Russell Sage Foundation.

9. Grofman, Bernard, Frank Wayman and Matt Barreto. 2009. "Rethinking partisanship: Some thoughts on a unified theory." In John Bartle and Paolo Bellucci (eds.) Political Parties and Partisanship: Social identity and individual attitudes. New York: Routledge Press.

8. Barreto, Matt, Ricardo Ramírez, Luis Fraga and Fernando Guerra. 2009. "Why California Matters: How California Latinos Influence the Presidential Election." In Rodolfo de la Garza, Louis DeSipio and David Leal (eds.) Beyond the Barrio: Latinos in the 2004 Elections. South Bend, ID: University of Notre Dame Press.

7. Francisco Pedraza and Matt Barreto. 2008. "Exit Polls and Ethnic Diversity: How to Improve Estimates and Reduce Bias Among Minority Voters." In Wendy Alvey and Fritz Scheuren (eds.) Elections and Exit Polling. Hoboken, NJ: Wiley and Sons.

6. Adrian Pantoja, Matt Barreto and Richard Anderson. 2008. "Politics *y la Iglesia*: Attitudes Toward the Role of Religion in Politics Among Latino Catholics" In Michael Genovese, Kristin Hayer and Mark J. Rozell (eds.) Catholics and Politics. Washington, D.C: Georgetown University Press..

5. Barreto, Matt. 2007. "The Role of Latino Candidates in Mobilizing Latino Voters: Revisiting Latino Vote Choice." In Rodolfo Espino, David Leal and Kenneth Meier (eds.) Latino Politics: Identity, Mobilization, and Representation. Charlottesville: University of Virginia Press.

4. Abosch, Yishaiya, Matt Barreto and Nathan Woods. 2007. "An Assessment of Racially Polarized Voting For and Against Latinos Candidates in California." In Ana Henderson (ed.) Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power:. Berkeley, CA: UC Berkeley Public Policy Press.

3. Barreto, Matt and Ricardo Ramírez. 2005. "The Race Card and California Politics: Minority Voters and Racial Cues in the 2003 Recall Election." In Shaun Bowler and Bruce Cain (eds.) Clicker Politics: Essays on the California Recall. Englewood-Cliffs: Prentice-Hall.

2. Barreto, Matt and Nathan Woods. 2005. "The Anti-Latino Political Context and its Impact on GOP Detachment and Increasing Latino Voter Turnout in Los Angeles County." In Gary Segura and Shawn Bowler (eds.) Diversity in Democracy: Minority Representation in the United States. Charlottesville: University of Virginia Press.

1. Pachon, Harry, Matt Barreto and Frances Marquez. 2004. "Latino Politics Comes of Age in the Golden State." In Rodolfo de la Garza and Louis DeSipio (eds.) Muted Voices: Latino Politics in the 2000 Election. New York: Rowman & Littlefield

RESEARCH AWARDS AND FELLOWSHIPS

Aug 2018	Provost Initiative for Voting Rights Research UCLA Latino Policy & Politics Initiative [With Chad Dunn]	*$90,000 – 24 months*
April 2018	Democracy Fund & Wellspring Philanthropic UCLA Latino Policy & Politics Initiative [With Sonja Diaz]	*$200,000 – 18 months*
March 2018	AltaMed California UCLA Latino Policy & Politics Initiative [With Sonja Diaz]	*$250,000 – 12 months*
Dec 2017	California Community Foundation UCLA Latino Policy & Politics Initiative [With Sonja Diaz]	*$100,000 – 12 months*
July 2013	Ford Foundation UW Center for Democracy and Voting Rights	*$200,000 – 12 months*
April 2012	American Values Institute [With Ben Gonzalez] Racial Narratives and Public Response to Racialized Moments	*$40,000 – 3 months*
Jan 2012	American Civil Liberties Union Foundation [With Gabriel Sanchez] Voter Identification Laws in Wisconsin	*$60,000 – 6 months*
June 2011	State of California Citizens Redistricting Commission An Analysis of Racial Bloc Voting in California Elections	*$60,000 – 3 months*
Apr 2011	Social Science Research Council (SSRC) [With Karam Dana] Muslim and American? A national conference on the political and social incorporation of American Muslims	*$50,000 – 18 months*
Jan 2011	impreMedia [With Gary Segura] Latino public opinion tracking poll of voter attitudes in 2011	*$30,000 – 6 months*
Oct 2010	National Council of La Raza (NCLR) [With Gary Segura] Measuring Latino Influence in the 2010 Elections	*$128,000 – 6 months*
Oct 2010	We Are America Alliance (WAAA) [With Gary Segura] Latino and Asian American Immigrant Community Voter Study	*$79,000 – 3 months*
May 2010	National Council of La Raza (NCLR) [With Gary Segura] A Study of Latino Views Towards Arizona SB1070	*$25,000 – 3 months*
Apr 2010	Social Science Research Council (SSRC) [With Karam Dana] Muslim and American? The influence of religiosity in Muslim political incorporation	*$50,000 – 18 months*
Oct 2009	American Association of Retired Persons (AARP) [With Gary Segura] Health care reform and Latino public opinion	*$25,000 – 3 months*
Nov 2008	impreMedia & National Association of Latino Elected Officials (NALEO) [With Gary Segura] 2008 National Latino Post-Election Survey, Presidential Election	*$46,000 – 3 months*
July 2008	National Association of Latino Elected Officials (NALEO) [With Gary Segura] Latino voter outreach survey – an evaluation of Obama and McCain	*$72,000 – 3 months*
June 2008	The Pew Charitable Trusts, Make Voting Work Project [with Karin MacDonald and Bonnie Glaser] Evaluating Online Voter Registration (OVR) Systems in Arizona and Washington	*$220,000 – 10 months*

RESEARCH GRANTS AND FELLOWSHIPS CONTINUED…

April 2008	National Association of Latino Elected Officials (NALEO) & National Council of La Raza (NCLR), 2008 Latino voter messaging survey	*$95,000 – 6 months*
Dec. 2007	Research Royalty Fund, University of Washington 2008 Latino national post-election survey	*$39,000 – 12 months*
Oct. 2007	Brenan Center for Justice, New York University [with Stephen Nuño and Gabriel Sanchez] Indiana Voter Identification Study	*$40,000 – 6 months*
June 2007	National Science Foundation, Political Science Division [with Gary Segura] American National Election Study – Spanish translation and Latino oversample	*$750,000 – 24 months*
Oct. 2006	University of Washington, Vice Provost for Undergraduate Education Absentee voter study during the November 2006 election in King County, WA	*$12,000 – 6 months*
Mar. 2006	Latino Policy Coalition Public Opinion Research Grant [with Gary Segura] Awarded to the Washington Institute for the Study of Ethnicity and Race	*$40,000 – 18 months*
2005 – 2006	University of Washington, Institute for Ethnic Studies, Research Grant	*$8,000 – 12 months*
Mar. 2005	Thomas and Dorothy Leavey Foundation Grant [with Fernando Guerra] Conduct Exit Poll during Los Angeles Mayoral Election, Mar. 8 & May 17, 2005 Awarded to the Center for the Study of Los Angeles	*$30,000 – 6 months*
2004 – 2005	Ford Foundation Dissertation Fellowship for Minorities	*$21,000 – 12 months*
2004 – 2005	University of California President's Dissertation Fellowship	*$14,700 – 9 months*
2004 – 2005	University of California Mexico-US (UC MEXUS) Dissertation Grant	*$12,000 – 9 months*
Apr – 2004	UC Regents pre-dissertation fellowship, University of California, Irvine,	*$4,700 – 3 months*
2003 – 2004	Thomas and Dorothy Leavey Foundation Grant [with Fernando Guerra] Awarded to the Center for the Study of Los Angeles	*$20,000 – 12 months*
2002 – 2003	Ford Foundation Grant on Institutional Inequality [with Harry Pachon] Conducted longitudinal study of Prop 209 on Latino and Black college admittance Awarded to Tomás Rivera Policy Institute	*$150,000 – 12 months*
2002 – 2003	Haynes Foundation Grant on Economic Development [with Louis Tornatzky] Knowledge Economy in the Inland Empire region of Southern California Awarded to Tomás Rivera Policy Institute	*$150,000 – 18 months*
2001 – 2002	William F Podlich Graduate Fellowship, Center for the Study of Democracy, University of California, Irvine	*$24,000 – 9 months*

RESEARCH UNDER REVIEW/WORKING PAPERS:

Barreto, Matt, and Christopher Parker. The Great White Hope: Donald Trump, Race, and the Crisis of American Politics. Under Contract, University of Chicago Press, *expected 2020*

Barreto, Matt and Christopher Parker. "The Great White Hope: Existential Threat and Demographic Anxiety in the Age of Trump." Revise and Resubmit.

Barreto, Matt, Natalie Masuoka, Gabe Sanchez and Stephen El-Khatib. "Religiosity, Discrimination and Group Identity Among Muslim Americans" Revise and Resubmit

Barreto, Matt, Gabe Sanchez and Barbara Gomez. "Latinos, Blacks, and Black Latinos: Competition, Cooperation, or Indifference?" Revise and Resubmit

Walker, Hannah, Matt Barreto, Stephen Nuño, and Gabriel Sanchez. "A comprehensive review of access to valid photo ID and the right to vote in America" [Under review]

Gutierrez, Angela, Angela Ocampo, Matt Barreto and Gary Segura. "From Proposition 187 to Donald Trump: New Evidence that Anti-Immigrant Threat Mobilizes Latino Voters." [Under Review]

Collins, Jonathan, Matt Barreto, Gregory Leslie and Tye Rush. "Racial Efficacy and Voter Enthusiasm Among African Americans Post-Obama" [Under Review]

Oskooii, Kassra, Matt Barreto, and Karam Dana. "No Sharia, No Mosque: Orientalist Notions of Islam and Intolerance Toward Muslims in the United States" [Under Review]

Barreto, Matt, David Redlawsk and Caroline Tolbert. "Framing Barack Obama: Muslim, Christian or Black?" [Working paper]

CONSULTING EXPERT:

- North Carolina, 2019, Expert for Plaintiffs in North Carolina voter ID lawsuit, NAACP v. Cooper
- New York, 2018, Expert for Plaintiffs in Census Citizenship Lawsuit, New York v. U.S. Dept of Commerce (also an expert related cases: *California v. Ross* and *Kravitz v. Dept of Commerce*)
- East Ramapo CSD, 2018, Expert for Plaintiffs in Section 2 VRA lawsuit, assessed polarized voting
- Dallas County, TX, 2017, Expert for Defense in Section 2 VRA lawsuit, Harding v. Dallas County
- Kansas, 2016, Expert for Plaintiffs in Kansas voter registration lawsuit, Fish v. Kobach 2:16-cv-02105-JAR
- North Dakota, 2015, Expert for Plaintiffs in North Dakota voter ID lawsuit, Brakebill v. Jaeger 1:16-cv-00008-CSM
- Alabama, 2015, Expert for Plaintiffs in Alabama voter ID lawsuit, Birmingham Ministries v. State of Alabama 2:15-cv-02193-LSC
- Texas, 2014, Testifying Expert for Plaintiffs in Texas voter ID lawsuit, Veasey v. Perry 2:13-cv-00193
- Galveston County, TX Redistricting, 2013, Expert report for Dunn & Brazil, LLC, Demographic analysis, vote dilution analysis, and racially polarized voting analysis for Section 2 lawsuit Galveston County JP/Constable districting
- Pasadena, TX Redistricting, 2013, Expert report for Dunn & Brazil, LLC, Demographic analysis, voter registration analysis, and racially polarized voting analysis for Section 2 lawsuit within Pasadena School District
- Harris County, TX Redistricting, 2011, Testifying Expert for Dunn & Brazil, LLC, Demographic analysis, voter registration analysis, and racially polarized voting analysis for Section 2 lawsuit within Harris County
- Pennsylvania, 2012, Testifying Expert for ACLU Foundation of Pennsylvania in voter ID lawsuit, Applewhite v. Commonwealth of Pennsylvania No. 330 MD 2012
- Milwaukee County, WI, 2012, Testifying Expert for ACLU Foundation of Wisconsin in voter ID lawsuit, Frank v. Walker 2:11-cv-01128(LA)
- Orange County, FL, 2012, Consulting Expert for Latino Justice/PRLDEF, Racially polarized voting analysis in Orange County, Florida
- Anaheim, CA, 2012, Consulting Expert for Goldstein, Demchak & Baller Legal, Racially polarized voting analysis for CVRA redistricting case Anaheim, CA
- Los Angeles County, CA, 2011, Consulting Expert for Goldstein, Demchak & Baller Legal, Racially polarized voting analysis for three redistricting cases in L.A.: Cerritos Community College Board; ABC Unified Schools; City of West Covina
- Harris County, TX Redistricting, 2011, Consulting Expert for Dunn & Brazil, LLC, Demographic analysis, voter registration analysis, for Section 5 objection within Harris County
- Monterey County, CA Redistricting, 2011, Consulting Expert for City of Salinas, Demographic analysis, creation of alternative maps, and racially polarized Voting analysis within Monterey County
- Los Angeles County Redistricting Commission, 2011, Consulting Expert for Supervisor Gloria Molina, Racially Polarized voting analysis within L.A. County
- State of California, Citizens Redistricting Commission, 2011, Consulting Expert, Racially Polarized Voting analysis throughout state of California
- Asian Pacific American Legal Center, 2011, Racially Polarized Voting analysis of Asian American candidates in Los Angeles for APALC redistricting brief
- Lawyers' Committee for Civil Rights and Arnold & Porter, LLP, 2010-12, Racially Polarized Voting analysis of Latino and Asian candidates in San Mateo County, concerning San Mateo County Board of Supervisors
- ACLU of Washington, 2010-11, preliminary analysis of Latino population patterns in Yakima, Washington, to assess ability to draw majority Latino council districts

- State of Washington, 2010-11, provided expert analysis and research for *State of Washington v. MacLean* in case regarding election misconduct and voting patterns
- Los Angeles County Chicano Employees Association, 2008-10, Racially Polarized Voting analysis of Latino candidates in L.A. County for VRA case, concerning L.A. County Board of Supervisors redistricting (6 reports issued 08-10)
- Brennan Center for Justice and Fried, Frank, Harris, Shriver & Jacobson LLP, 2009-10 Amicus Brief submitted to Indiana Supreme Court, *League of Women Voters v. Rokita*, regarding access to voter identification among minority and lower resource citizens
- State of New Mexico, consulting expert for state in *AAPD v. New Mexico*, 2008,
- District of Columbia Public Schools (DCPS), statistical consultant for survey methodology of opinion survey of parents in DCPS district (for pending suit), 2008,
- Brennan Center for Justice, 2007-08, Amicus Brief submitted to U.S. Supreme Court, and cited in Supreme Court decision, *Crawford v. Marion County*, regarding access to voter identification among minority and lower-resource citizens
- Los Angeles County Chicano Employees Association, 2002-07, Racially Polarized Voting analysis of Latino candidates in L.A. County for VRA case, concerning L.A. County Board of Supervisors redistricting (12 + reports issued during 5 years)
- Monterrey County School Board, 2007, demographic and population analysis for VRA case
- Sweetwater Union School District, 2007-08, Racially Polarized Voting analysis, and demographic and population analysis for VRA case
- Mexican American Legal Defense Fund, 2007-08, Racially Polarized Voting analysis for Latino candidates, for City of Whittier city council races, for VRA case
- ACLU of Washington, 2008, preliminary analysis of voting patterns in Eastern Washington, related to electability of Latino candidates
- Nielsen Media Research, 2005-08, with Willie C. Velasquez Institute, assessed the methodology of Latino household recruitment in Nielsen sample

TEACHING EXPERIENCE:

UCLA & UW — 2005 – Present

- Minority Political Behavior (Grad Seminar)
- Politics of Immigration in the U.S. (Grad Seminar)
- Introduction to Empirical/Regression Analysis (Grad Seminar)
- Advanced Empirical/Regression Analysis (Grad Seminar)
- Qualitative Research Methods (Grad Seminar)
- Political Participation & Elections (Grad Seminar)
- The Voting Rights Act (Law School seminar)
- Research methodology II (Law School Ph.D. program seminar)
- U.S. Latino Politics
- Racial and Ethnic Politics in the U.S.
- Politics of Immigration in the U.S.
- Introduction to American Government
- Public Opinion Research
- Campaigns and Elections in the U.S.
- Presidential Primary Elections

Teaching Assistant
University of California, Irvine — 2002 – 2005

- Intro to American Politics (K. Tate)
- Intro to Minority Politics (L. DeSipio)
  Recognized as Outstanding Teaching Assistant, Winter 2002
- Statistics and Research Methods (B. Grofman)
  Recognized as Outstanding Teaching Assistant, Winter 2003

BOARD & RESEARCH APPOINTMENTS

Founding Partner
Latino Decisions — 2007 – Present

Senior Research Fellow
Center for the Study of Los Angeles, Loyola Marymount University — 2002 – Present

Board of Advisors
American National Election Study, University of Michigan — 2010 – Present

Advisory Board
States of Change: Demographics & Democracy Project — 2014 – Present
CAP, AEI, Brookings Collaborative Project

Research Advisor
American Values Institute / Perception Institute — 2009 – 2014

Expert Consultant
State of California, Citizens Redistricting Committee — 2011 – 2012

Senior Scholar & Advisory Council
Latino Policy Coalition, San Francisco, CA — 2006 – 2008

Board of Directors
CASA Latina, Seattle, WA — 2006 – 2009

Faculty Research Scholar
Tomás Rivera Policy Institute, University of Southern California — 1999 – 2009

PHD STUDENTS UCLA & UW

Committee Chair or Co-Chair

- Francisco I. Pedraza – University of California, Riverside (UW Ph.D. 2009)
- Loren Collingwood – University of California, Riverside (UW Ph.D. 2012)
- Betsy Cooper – Public Religion Research Institute, Washington DC (UW Ph.D. 2014)
- Sergio I. Garcia-Rios – Cornell University (UW Ph.D. 2015)
- Hannah Walker – Rutgers University (UW Ph.D. 2016)
- Kassra Oskooii – University of Delaware (UW Ph.D. 2016)
- Angela Ocampo – Arizona State University (UCLA Ph.D. 2018)
- Ayobami Laniyonu – University of Toronto (UCLA Ph.D. 2018)
- Adria Tinin – *in progress* (UCLA ABD)
- Bang Quan Zheng – *in progress* (UCLA ABD)
- Bryan Wilcox-Archuleta – *in progress* (UCLA ABD)
- Tyler Reny – *in progress* (UCLA ABD)
- Angie Gutierrez – *in progress* (UCLA)
- Shakari Byerly-Nelson – *in progress* (UCLA)
- Vivien Leung – *in progress* (UCLA)

Committee Member

- Jessica Stewart – Emory University (UCLA Ph.D. 2018)
- Jonathan Collins – Brown University (UCLA Ph.D., 2017)
- Lisa Sanchez – University of Arizona (UNM Ph.D., 2016)
- Nazita Lajevardi – Michigan State University (UC San Diego Ph.D., 2016)
- Kiku Huckle – Pace University (UW Ph.D. 2016)
- Patrick Rock (Social Psychology) – (UCLA Ph.D. 2016)
- Raynee Gutting – Loyola Marymount University (Stony Brook Ph.D. 2015)
- Christopher Towler – Sacramento State University (UW Ph.D. 2014)
- Benjamin F. Gonzalez – San Diego State University (UW Ph.D. 2014)
- Marcela Garcia-Castañon – San Francisco State University (UW Ph.D. 2013)
- Justin Reedy (Communications) – University of Oklahoma (UW Ph.D. 2012)
- Dino Bozonelos – Cal State San Marcos (UC Riverside Ph.D. 2012)
- Brandon Bosch – University of Nebraska (UW Ph.D. 2012)
- Karam Dana (Middle East Studies) – UW Bothell (UW Ph.D. 2010)
- Joy Wilke – *in progress* (UCLA ABD)
- Erik Hanson – *in progress* (UCLA)
- Christine Slaughter – *in progress* (UCLA)
- Lauren Goldstein (Social Psychology) – *in progress* (UCLA)
- Barbara Gomez-Aguinaga – University of Nebraska (UNM Ph.D., *in progress*)

Exhibit 57

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5770 (JMF)
NEW YORK IMMIGRATION COALITION, et al., Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*, et al., Defendants.	20-CV-5781 (JMF)

Expert Declaration of Mr. John Thompson

I. Introduction

1. On July 21, 2020 President Trump issued a Memorandum for the Secretary of Commerce on *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census* (in the remainder of this document I will use the term "Memorandum" to refer to this document). I am extremely concerned that this action will adversely affect the quality and accuracy of the 2020 Census.

2. The 2020 Census results will be of great importance to our nation. The Constitution requires that the census be used for reapportioning the Congress of the United States and the Electoral College. The 2020 Census will also be used for numerous other functions to support good

policymaking and economic growth including: redrawing congressional and state legislative voting districts; allocating over $1.5 trillion of federal funds annually; informing sound policy development; providing critical information for state, local and tribal government planning; and supplying critical information to large and small businesses to generate growth and job creation. Inaccuracies or errors in the 2020 Census will have grave consequences on these uses for the subsequent 10-year period.

3. I have carefully reviewed the Memorandum instructing the Secretary of Commerce to provide information to exclude undocumented persons from the Apportionment counts. I have also reviewed the 2020 Census Operational Plans as well as the documentation that the Census Bureau has issued describing the actions it is taking in response to the COVID-19 pandemic. I have two serious concerns regarding the Memorandum: (1) it will significantly increase the risk of larger total and differential undercounts, relative to previous censuses, for the hard-to-count populations, including immigrant communities; and (2) it lacks transparency as required by law and the Census Bureau Statistical Quality Standards that would allow for the assessment of the methodology that might be used in response to the direction to exclude undocumented persons from the 2020 Census Apportionment counts.

II. Qualifications

4. Below I briefly describe specific aspects of my qualifications and work experience that establishes my credentials as an accomplished statistician and an expert on the Census Bureau and Decennial Census. I have also attached a copy of my CV to this declaration.

5. I have served as both the Director of the U.S. Census Bureau and as the career senior executive in charge of management of all aspects of the 2000 Decennial Census. I am also a distinguished professional in the area of statistics and survey design. I have a deep understanding of the processes that are necessary to achieve a complete and highly accurate Decennial Census.

6. I served as the Director of the U.S. Census Bureau from August 2013 to June 2017. Prior to becoming Director, I worked at the Census Bureau for 27 years (from 1975 to 2002). I started my career as a mathematical statistician in 1975. I spent the majority of my employment at the Census Bureau focused on the Decennial Census and ultimately served as the Associate Director for the 2000 Decennial Census, with management responsibility for all phases of the 2000 Decennial Census.

7. The Census Bureau is the largest Statistical Agency and produces a wide range of demographic and economic statistics including: the Decennial Census; the American Community Survey; the Current Population Survey; the National Crime Victimization Survey, the National Health Interview Survey; the Economic Census; the release of 13 principle key economic indicators on a monthly or quarterly basis; and conducts about 100 additional surveys. The Director of the Census Bureau is appointed by the President and

confirmed by the Senate.

8. My responsibilities as Director of the Census Bureau included overseeing the research and testing that produced the design for the 2020 Census. During my tenure, the original operational plan for conducting the 2020 Census was released, as was an updated version 2.0 of this plan. In addition, major field tests were conducted in 2013, 2014, 2015 and 2016. The results of these tests informed the final 2020 Census Design that was tested in the 2018 end-to-end test. During my service, the Census Bureau reviewed the residence criteria used to determine where to count the residents of the United States. A preliminary proposal for the 2020 residence criteria was issued for public comment on June 30, 2016.[1] In particular, the Census Bureau was following the same principles that had guided each previous Decennial Census – the Constitution requires that everyone living in the United States should be included in the enumeration, regardless of immigration status, for all uses of the census, including Apportionment. The final 2020 Census residence criteria were issued on February 5, 2018, and again followed these same principles to count everyone living in the United States at their usual place of residence regardless of immigration status for Apportionment and all other uses.[2]

9. Prior to being appointed Director of the Census Bureau I was at National Opinion Research Center (NORC) at the University of Chicago, serving as Executive Vice President from 2002 to 2008 and President from 2008 to 2013. NORC is an objective, non-partisan independent research institution that delivers reliable data and rigorous analysis to guide critical programmatic, business, and policy decisions. Clients include government, corporate, and nonprofit organizations around the world who partner with NORC to transform increasingly complex information into useful knowledge. NORC conducts research in five main areas: Economics, Markets, and the Workforce; Education, Training, and Learning; Global Development; Health and Well-Being; and Society, Media, and Public Affairs. NORC services include designing and conducting surveys (telephone, Internet, and in-person) as well as analytical studies.

10. From July 2017 to August 2018, I served as the Executive Director of the Council of Professional Associations on Federal Statistics (COPAFS). COPAFS is an organization with a membership consisting of professional associations and research organizations that depend on and support high quality federal statistics. The Executive Director of COPAFS must have a deep understanding of the Federal Statistical System and the wide range of data products that are produced. Serving as the Executive Director of COPAFS reinforced my appreciation of the importance of high-quality Decennial Census data to the entire Federal Statistical System.

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[1] Federal Register, 81 FR 42577, Proposed 2020 Census Residence Rule and Residence Situations, June 30, 2016.
[2] Albert E. Fontenot, Jr., 2020 Census Residence Criteria and Residence Situations, 2020 Census Program Memorandum Series: 2018.04, February 5, 2018.

11. In addition to the work experience described above, I am an elected Fellow of the American Statistical Association and was selected to serve on the National Academies of Science, Engineering, and Medicine Committee on National Statistics.

III. Concerns

A. Background on the Decennial Census

12. The uses of the data generated by the Decennial Census are extremely important for all components of our democracy and economy, including: the constitutionally required reapportionment of the Congress; redrawing congressional and state legislative voting districts; allocating over $1.5 trillion in federal funds annually; supporting evidence based policy making by state, local and tribal governments; and allowing informed decisions by large and small business to generate economic growth and job creation. Inaccuracies or undercounts in Decennial Census data will result in under-representation of the affected population groups not just in the immediate term, but for ten subsequent years until the next Decennial Census results are available.

B. The 2020 Census was already facing unprecedented challenges prior to the release of the Memorandum.

13. The COVID-19 pandemic forced the delay of key operations out of concerns for the safety of both census workers and the general public. The in-person components of the local partnership program to increase response rates of the traditionally hard-to-count populations were delayed, as was the operation to collect responses from those households that do not self-respond. This operation is referred to as nonresponse follow-up or NRFU. In my opinion, NRFU is the most critical operation to achieving a fair and accurate enumeration. Currently the national self-response rate is 63 percent, which means that over 37 percent or over 50 million housing units and their occupants must still be enumerated.[3] A successful NRFU is therefore essential to achieving a complete enumeration for the 2020 Census.

14. The NRFU operation had been scheduled to start on May 15, 2020 and run through July 31, 2020. However, as a result of the COVID-19 pandemic, the Census rescheduled it to start in most of the United States on August 11, 2020 and initially planned to complete it by October 30, 2020.

15. In order to accommodate this delay, the Census Bureau had requested, through the Department of Commerce, a four-month extension of the legal deadlines[4] to deliver Apportionment and redistricting data. For Apportionment this would extend the current deadline of December 31, 2020 to April 30, 2021. For redistricting data, the requested

[3] US Census Bureau 2020 Census daily response rate tracker, https://2020census.gov/en/response-rates.html (last accessed August 6, 2020).
[4] Title 13, US Code, Section 141, (b) and (c).

extension was from March 31, 2021 to July 31, 2021.

16. However, the Census Bureau has announced that the deadlines will not be extended, and that the NRFU will now be completed by September 30, 2020.[5] The Census Bureau will have to take steps to complete the NRFU more rapidly than they planned.

17. In this situation the risk that the hard-to-count populations will be underrepresented increases greatly. Cooperation on the part of the households in NRFU is going to be essential. However, as I discuss below, the issuance of the Memorandum will most likely decrease cooperation and willingness to participate further reducing the effectiveness of NRFU in achieving a fair and accurate enumeration.

C. The confidence of respondents that the 2020 Census will be confidential will be significantly eroded leading to increased undercounts

18. The Census Bureau has made good progress since the 1990 Decennial Census, and had great success during both the 2000 and 2010 Decennial Censuses in reducing undercounts. A key component of this success has been the deployment of a combined national and local advertising and local partnership program to deliver a message to hard-to-count populations that the census is important to their community, and that the data collected through the census is completely confidential. No individual's information is shared with any other organization or law enforcement entities.

19. This messaging program was responsible for dramatic gains in the accuracy and coverage of the 2000 and 2010 Decennial Census relative to the 1990 Census, which did not include such a program. For example, the undercount of Black or African Americans dropped from 4.6 percent in 1990 to 2.1 percent in 2010.[6] For the Hispanic population the undercount dropped from 5.0 percent to 1.5 percent.[7]

20. Census Bureau research conducted in planning for the 2020 Census has identified serious concerns that potential respondents have with respect to the confidentiality of their information prior to the release of the Memorandum. For example:

    a. Census Bureau researchers conducted qualitative research that was presented at the 2018 American Association of Public Opinion Research annual conference that

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[5] Statement from U.S. Census Bureau Director Steven Dillingham: Delivering a Complete and Accurate 2020 Census Count, https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html, August 3, 2020.

[6] P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

[7] P. Cantwell, DSSD 2010 Census Coverage Measurement Memorandum Series # 2010-G-01, (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

indicated that fear of government was higher than had been experienced in prior years.[8]

b. The 2020 Census Barriers Attitudes and Motivators Study was conducted to understand the concerns of potential respondents to help shape the 2020 Census advertising and communication program themes and messages. The study found that the two most significant barriers to participation in the 2020 Census were: (1) concerns that the Census Bureau would share information with other government agencies; and (2) that the information that respondents provided would be used against them[9]. Non-White and Hispanic groups were much more concerned than the White non-Hispanic group. In addition, respondents that were not proficient in English were much more concerned than those who were (39 percent compared to 23 percent).

c. The Census Bureau also conducted research on the potential effects of adding a citizenship question to the 2020 Census questionnaire.[10] This research indicated that the question would reduce self-response of the non-citizen population. Furthermore, the research found that it was likely that households that refuse to respond to the census questionnaire because of the citizenship question are also likely to not respond to NRFU enumerators. It is my opinion, based on my experience in implementing the 2000 Census and my work in leading the design and planning for the 2020 Census, that the Memorandum is likely to have similar effects on NRFU response.

21. In order to address these concerns, a cornerstone of the 2020 Census advertising and partnership program, is a message that respondent information is confidential. The Census Bureau will not share it with any outside entities, including law and immigration enforcement. It is my opinion that the Memorandum will reduce the effectiveness of the 2020 Census advertising and partnership program in gaining the confidence of respondents in traditionally hard-to-count communities.

22. For example, a critical factor in underlying response and participation in the 2020 Census is the macro environment under which the NRFU is being conducted. While the 2020 Census advertising and partnership program is designed to positively influence this environment, other factors such as the issuance of the Memorandum can have the opposite effect. As Census Bureau Chief Scientist, Dr. John Abowd, acknowledged during recent trial testimony[11] in the matter considering the potential effects of adding a citizenship question to the 2020 Census questionnaire, the macro environment was likely to be affected by actions to

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[8] AAPOR Panel on *Changes in Respondent Privacy, Confidentiality, and Data Sharing Concerns*, Meyers, Goerman, Harris-Kojetin, Terry, and Fobia, Denver, Colorado, May 18, 2018

[9] CBAMS report

[10] J. David Brown, Misty L. Heggeness, Suzanne M. Dorinski, Lawrence Warren, and Moises Yi *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census*, August 6, 2018.

[11] Trial Testimony of Dr. John Abowd, Nov. 13, 2018, *New York Immigration Coalition, et al. v. United States Department of Commerce, et al.,* 18-CV-5025-JMF (S.D.N.Y), at 926-27.

add a citizenship question. Furthermore, Dr. Abowd acknowledged that the political environment around immigration could amplify the effects of a citizenship question on decreased response.

23. It is my opinion that the effects of the Memorandum on the current macro environment are likely to be as great if not greater than the addition of a citizenship question. Therefore, immigrants and the families of immigrants will be reluctant to participate in the NRFU and many will not be enumerated. It is also likely, in my opinion, that this reluctance to participate will extend to other hard-to-count populations as well. The issuance of the Memorandum has significantly increased the risk of larger total and differential undercounts, relative to previous censuses.

D. Lack of transparency

24. At this point, little is known about the ultimate quality and accuracy of the 2020 Census. The location and magnitude of errors caused by potential undercounts and overcounts has not been determined. In addition, the level of inclusion of undocumented persons in the 2020 Census is also unknown.

25. It will be very challenging for the Census Bureau to determine the number of undocumented persons that are included in the 2020 Census at the time when Apportionment data is required to be reported. It is critical for the Census Bureau and the Department of Commerce to describe the methodology that they intend to utilize to estimate the numbers of undocumented persons enumerated in the 2020 Census and what are appropriate measures of accuracy that would support the usage of such methodologies. The Memorandum does not provide any specific directions and the Census Bureau has not described how it will comply with the Memorandum.

26. There are legal and statistical standards that the Census Bureau has followed and should continue to follow with respect to transparency:

    a. The Census Bureau is a Federal Statistical Agency and as Director Dillingham noted in sworn testimony July 29, 2020, the Census Bureau intends to follow the principles and practices identified by the Committee on National Statistics for Federal Statistical Agencies.[12] Principle 2, *Credibility among Data Users*, states: "Also essential to building credibility are for an agency to be open and transparent about its data sources and their limitations, demonstrate understanding of users' needs and priorities, fully document the processes used to produce and disseminate statistical products, and take proactive steps to preserve data for future use."

[12] Committee on National Statistics, Principles and Practices for a Federal Statistical Agency 2 (6th ed. 2017).

b. The Office of Management and Budget issued a Memorandum on April 24, 2019 *Improving Implementation of the Information Quality Act* to the Heads of all Executive Departments and Agencies strengthening previous guidance in this area.[13] This document states: "The IQA requires agencies conduct pre-dissemination review of their information products. During this review, each agency should consider the appropriate level of quality for each of the products that it disseminates based on the likely use of that information."

27. In 2013 the Census Bureau issued Statistical Quality Standards that are currently guiding the conduct of all their programs including the 2020 Census.[14]

a. In particular: Statistical Quality Standard F1, *Releasing Information Products Requirement F1-6* states: "Information products must comply with the Census Bureau's statistical quality standards and must be free of serious data quality issues in order to be released outside the Census Bureau without restrictions." Statistical Quality Standard F2, *Providing Documentation to Support Transparency in Information Products* Requirement F2-2 states: "Documentation must be readily accessible in sufficient detail to allow qualified users to understand and analyze the information and to reproduce (within the constraints of confidentiality requirements) and evaluate the results."

28. The most important information produced and released by the Census Bureau is the constitutionally mandated Apportionment data. Because this information is so vital to our democracy, it is critically important that the Department of Commerce and the Census Bureau are transparent in their adherence to their legal and statistical standards. At a minimum, the Census Bureau has an obligation to assure the public and stakeholders that any methods it develops for determining the number of undocumented individuals is statistically sound.

VI. Conclusion

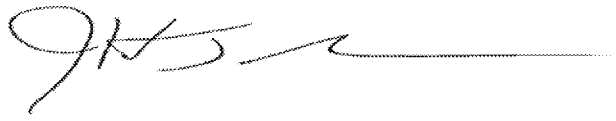
In conclusion, it is my opinion that the issuance of the Memorandum will significantly increase the risk of much larger undercounts for the 2020 Census than measured in previous censuses, including undercounts of immigrant communities. In addition, there is no transparency or documentation of how the quality and fitness for use of the Apportionment counts will be determined, nor is there any documentation of how the number of undocumented persons potentially included in the 2020 Census will be determined.

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[13] Russel T. Vought, Acting Director OMB, Memorandum for the Heads of Executive Departments and Agencies, Subject: *Improving Implementation of the Information Quality Act* (Apr. 24, 2019).
[14] U.S. Census Bureau Statistical Quality Standards (Jul. 2013).

Executed on August 6, 2020 at Bend, Oregon.

I declare under penalty of perjury that the foregoing is true and correct.



John Thompson

Appendix A

JOHN H. THOMPSON

BRIEF CAREER HISTORY

Extensive Senior Executive leadership in the non-profit and federal sectors, with experience in social science research and statistics, congressional advocacy, building coalitions, operational management, business development, stakeholder relations, innovation, and strategic vision.

Independent Consultant, August 2018 to present

Consulting service focusing on survey methodology, executive leadership, the Federal Statistical System, and decennial census. Activities have included:

- Expert witness for the plaintiffs in two court cases opposing the addition of a citizenship question to the 2020 Census
  - New York Immigration Coalition, et al v. United States Department of Commerce and Wilbur Ross, U.S. District Court for the Southern District of New York, and
  - Robyn Kravitz et al., v. United States department of Commerce, et al
- Training news media journalists on the 2020 Census with Georgetown University, the Poynter Center, and the Harvard Shorenstein Center.
- Providing consultation services to NORC at the University of Chicago

Executive Director, Council of Professional Associations on Federal Statistics – July 2017 to August 2018

The Council of Professional Associations on Federal Statistics (COPAFS) was founded in 1981 to coordinate activities of a number of Associations, Organizations, and Businesses that rely on federal statistics to support good governance and economic growth. COPAFS now represents a growing body of stakeholders that support the production and use of high quality statistics. The Executive Director represents these stakeholders in realizing their mission to *Advance Excellence in Federal Statistics*. Activities include:

- Advocated on behalf of federal agencies. For example, COPAFS is a co-chair of the Friends of the Bureau of Labor Statistics, and the Friends of the National Center for Health Statistics;
- Worked with stakeholder coalitions to support proper funding for the 2020 Census and the American Community Survey;
- Ensured members of Congress, COPAFS members, and other stakeholders were informed of critical issues facing agencies that produce federal statistics;
- Alerted members and stakeholders of breaking issues that needed immediate support and attention;
- Organized and supported ongoing educational efforts for members of Congress and their staff on the value and importance of federal statistics both nationally and in their own states and districts;
- Created and joined in powerful coalitions of organizations and businesses to advocate on behalf of federal agencies that produce statistics, building broad support across a wide spectrum of data users;

- Built partnerships with foundations that help fund critical research in the statistical agencies and academia to ensure the on-going modernization of how statistical data are created and made available to the public and researchers, and to fund educational efforts;
- Worked closely with the Chief Statistician of the United States and the statistical agencies to help inform and promote modernization efforts underway and assist agencies in keeping abreast of new stakeholder data needs; and
- Hosted events to demonstrate the importance of federal statistics such as the 2018 Federal Committee on Statistical Methodology Research and Policy Conference.

Director, United States Census Bureau – August 2013 to June 2017

Appointed by the President as Director of the largest federal statistical agency, with a staff of over 5,000 headquarters employees and approximately 10,000 to 15,000 staff spread across the United States in six regional offices and a major production facility in Indiana, with an annual budget exceeding $1 billion. Key accomplishments include:

- Worked successfully with the executive and legislative branches of the federal government, including the White House, the Office of Management and Budget, Cabinet officials, and members of Congress and congressional staff, to accomplish a major transformation of the Census Bureau into a forward-looking 21st century statistical agency. Testified at 6 congressional hearings on the Census Bureau;
- Provided a conceptual vision and lead a redesign of the 2020 decennial census that is estimated to save $5 billion through effective use of operations research-driven reengineering of field operations, innovative use of technology, and partnership with key stakeholders;
- Lead outreach to key stakeholders including representatives of state local and tribal governments; advocacy organizations; professional associations, business groups, various media; and academic researchers;
- Put in place a robust research program to support mission critical activities, such as linking administrative records, disclosure avoidance methods, economic studies, statistical research, survey methodology, big data, and data dissemination;
- Lead efforts to maintain congressional support and funding for the American Community Survey, a critical data asset of the federal government, including mobilizing a diverse group of key stakeholders to effectively advocate in support of the survey, personally visiting almost all of the House of Representatives and Senate members of the Census Bureau appropriations and oversight committees, and establishing a program of research directly related to the concerns that had been raised;
- Improved economic statistics through research on using alternatives to direct survey data collection to produce statistics that are timelier and have increased granularity, and carrying out three initiatives to advance the release of principal economic indicators on trade, retail sales and services, which allowed the Bureau of Economic Analysis to significantly reduce revisions to Gross Domestic Product (GDP) estimates;
- Recruited outstanding research staff including new senior leadership for Research and Methodology, the Director of a newly established big data center, and seven former Presidential Innovation Fellows; and
- Improved data dissemination to the public, including development of a platform to deliver data in ways that will meet the rapidly evolving demands of a growing body of users. In addition,

in order to meet immediate targeted demands two new tools were released: City SDK (Software Development Kit) to allow easy developer access; and Census Business Builder a tool that combines small area demographic and economic data in a way that is easily accessible for entrepreneurs and small business owners.

President and Executive Vice President, NORC at the University of Chicago – July 2002 to August 2013

NORC is a national non-profit organization that conducts high quality social science research in the public interest. As President, I had responsibility for all NORC corporate activities and for the quality of all NORC research efforts. I provided vision for NORC to establish the organization as a leader in the social science research industry. My accomplishments included:

- Strengthened the organization's high-quality, diverse staff;
- Broadened the scope of the collaborations between NORC and the University of Chicago;
- Realized nearly 50 percent growth in revenue and greatly expanding NORC's portfolio of business and research programs; and
- Provided leadership in the social science research community - selected to be a Fellow of the American Statistical Association (ASA), elected to serve a term as Chair of the Social Statistics Section of the ASA, and chaired the 2009 ASA Committee on Fellows. Also elected as a member of the Committee on National Statistics, serving on two National Academy of Sciences panels addressing 2010 and 2020 Census concerns.

As Executive Vice President of Survey Operations (2002 – 2008), I provided oversight and direction to the Economics, Labor Force, and Demography Research Department, the Statistics and Methodology Department, and Survey Operations for field and telephone data collection. My major accomplishments included:

- Provided leadership and guidance for a major corporate initiative, the National Immunization Survey, which is conducted on behalf of the Centers for Disease Control and Prevention, and is the largest telephone survey in the United States conducted via random digit dialing for scientific purposes.
- Significantly increased the productivity and cost effectiveness of NORC's overall data collection activities;
- Successfully utilized skills in directing large project start-ups, and in managing large complex operations, directing the project through the completion of the first contract phase, which included the first year of data collection and the delivery of the first data set; and
- All survey operations were completed on schedule, and within budget including the delivery of an extremely complex data set, and a public use file.

Principal Associate Director and Associate Director for Decennial Census Programs, United States Census Bureau – 1997 to July 2002

Served as the senior career executive responsible for all aspects of the 2000 Decennial Census. This was the largest peacetime mobilization undertaken by the U.S. government, with a budget of $6.5 billion, establishment of over 500 field offices, a temporary workforce that peaked at over 500,000, and establishment of telephone capacity to receive over 5 million calls over a period of one month. I was also chairman and director of the Executive Steering Committee for Accuracy & Coverage Evaluation Policy for the 2000 Census. This Committee was charged with making a recommendation as to whether or not to adjust the 2000 Census redistricting data for coverage errors, an issue fraught with political disagreement and controversy. This work was widely recognized as superb – with the Committee's recommendation supported by numerous reviews, including the National Academy of Sciences Panel on evaluating Census 2000.

EDUCATION

M.S.	Virginia Polytechnic Institute and State University, 1975 Mathematics Graduate course work in statistics - George Washington University 1977-1981
B.S.	Virginia Polytechnic Institute and State University, 1973 Mathematics

PROFESSIONAL SERVICE AND ASSOCIATIONS

American Statistical Association, 1975 to Present

Chair, Social Statistics Section – 2011

Chair, ASA Committee on Fellows - 2009

National Academy of Sciences,

Member of the Committee on National Statistics – 2011 - 2013

Member of the Panel on the Design of the 2010 Census Program of Evaluations and Experiments

Member of the Panel to Review the 2010 Census

HONORS AND AWARDS

Virginia Tech College of Science Hall of Distinction inaugural class, 2013

Presidential Rank Award of Meritorious Executive, 2001

Department of Commerce, Gold Medal, U.S. Bureau of the Census, 2000

Elected Fellow of the American Statistical Association, 2000

Department of Commerce, Silver Medal, U.S. Bureau of the Census, 1998

Department of Commerce, Bronze Medal, U.S. Bureau of the Census, 1988

PAPERS AND PUBLICATIONS

2018 Thompson, John H and Yablon, Robert. Issue Brief: "Preparing for the 2020 Census Considerations for State Attorneys General". American Constitution Society., October 10, 2018

2012 Thompson, John H. (Panel Member). "Panel Discussion: Considering Changing Sectors in the Research Industry?: Advice From Those Who Have Done It!" AAPOR 67th Annual Conference, Orlando, Florida, May 19, 2012

2012 Thompson, John H. (Discussant). "Future is Now: Realignment of Current Survey Management and Operations at the Census Bureau". Population Association of America 2012 Annual Meeting, San Francisco, California, May 4, 2012.

2012 Thompson, John H. (Discussant). "Use of Administrative Records in the 2020 Census." Federal Committee on Statistical Methodology, Washington, DC., January 10, 2012

2011 Weinberg, Daniel H. and Thompson, John H., "Organization and Administration of the 2010 U.S. Census." In Margo J. Anderson, Constance F. Citro, and Joseph J. Salvo (eds.) *Encyclopedia of the U.S. Census,* Second Edition, CQ Press., July 2011

2010 Thompson, John H., "Challenges, Innovation and Quality for the 21st Century" Keynote Speech at the 2010 FCSM Statistical Policy Seminar, Washington, DC, December 14, 2010.

2010 Thompson, John H., "The Future of Survey Research: Opportunities and Challenges" Paper presented at the Applied Demography Conference, San Antonio, Texas., January 11, 2010 and at the Population Association of America 2010 Annual meeting, Dallas, Texas, April 15, 2010.

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